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REEVES'
HISTORY OF THE ENGLISH LAW.

EDITED BY
W. F. FINLASON.

VOL. IV.

REEVES'
HISTORY OF THE ENGLISH LAW,
FROM THE
TIME OF THE ROMANS
TO THE
END OF THE REIGN OF ELIZABETH.

WITH NUMEROUS NOTES, AND AN INTRODUCTORY DISSERTATION ON THE
NATURE AND USE OF LEGAL HISTORY, THE RISE AND PROGRESS
OF OUR LAWS, AND THE INFLUENCE OF THE ROMAN
LAW IN THE FORMATION OF OUR OWN.

BY
W. F. FINLASON, Esq.,
BARRISTER-AT-LAW.

A New American Edition,
COMPLETE IN FIVE VOLUMES.

VOL. IV.
FROM THE REIGN OF EDWARD IV. TO THE REIGN OF
EDWARD VI.

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CONTENTS

OF THE FOURTH VOLUME.

CHAPTER XXIV.

EDWARD IV., EDWARD V., AND RICHARD III.

	PAGE
Statutes of Edward IV. — The Jurisdiction of the Sheriff's Tourn	
Restrained — Gaming — Statutes of Richard III. — Bailing	
Felons — Uses — Fines — Recoveries — Taltarum's Case —	
Uses — Contracts — Equity — The Criminal Law — Treason	
— Larceny — Appeals — Provors — Battel — Sanctuary —	
Clergy	9-60

CHAPTER XXV.

HENRY VI. AND EDWARD IV.

Of the Canon Law — Of Bishops — Officials — Of Things — Of Of-	
fences — Of Proceedings in Civil Suits — The Libel — Litis	
Contestatio — Dilationes — Missio in Bono — Of Sequestra-	
tion — Of Proof — Of Witnesses — Of Exceptions — Appeals	
— Of Proceedings in Criminal Suits — Accusation — Inqui-	
sition — Denunciation — Purgation — Excommunication — In-	
terdict — Suspension	61-97

CHAPTER XXVI.

EDWARD IV.

Of Ecclesiastical Jurisdiction — Of Matrimony — Espousals —	
Nuptiæ — Of Cognation — Consanguinity — Affinity — Of Di-	
vorce — Jactitation of Marriage — Of Wills and Testaments —	
Executors — Of the Forms of Wills, etc. — Of Probate — Of	
Intestacy — Of Pious Uses — The Rationabilis Pars — Tithes	
— Sylva Cædua — Composition for Tithes — Spoliation — Suits	
de Læsione Fidei — Defamation — Ecclesiastical Courts — Pro-	

	PAGE
hibitions—Provincial Constitutions—King and Government — The Statutes—Fortescue—Littleton—Lyndwode—Re- ports and Law-Books—Miscellaneous Facts	98-161

CHAPTER XXVII.

HENRY VII.

Attending the King in his Wars—Vagrants—Corporations— Statute of Fines—Statutes of Pernors of Profits—Aliena- tions of Jointresses made Void—Suits in Formâ Pauperis— Attaints—Stealing Women—The Star Chamber New Mod- elled—Informations at the Assizes and Sessions—Appeal of Murder—Bailing Felons by Justices of the Peace—Benefit of Clergy—Bargain and Sale—Of Uses—Covenants to Stand Seized—Ejectione Firmæ—Actions of Assumpsit— The Chancery—Of Treason—Larceny—Sanctuary—King and Government—Printing of Law-Books—Miscellaneous Facts	162-266
--	---------

CHAPTER XXVIII.

HENRY VIII.

Of Judicature in Wales, and in the Counties Palatine—Of Parlia- ment—Of the Ecclesiastical Polity—Fees of Ordinaries— Residence and Pluralities—Submission of the Clergy—Papal Authority Abolished—Marriage—Tithes—Of Precedence —The Poor Laws—Of Trade—Terms for Years—Leases of Tenant in Tail—Gifts to Superstitious Uses—Devise of Land—Statute of Uses—Jointures—Statute of Wills— Statute of Bankrupts—Court of Wards and Liveries Erected —Outlawry—Jurors' Attaint—Statute of Jeofail—Statute of Limitations—Trinity Term Altered	267-411
---	---------

CHAPTER XXIX.

HENRY VIII.

Many New Treasons Created—Treason by Writing or Speaking— To Disobey the King's Proclamations—Statute of the Six Articles—Punishment of Poisoning—Of Larceny—Servants Embezzling Goods—Larceny in a House—Law against Gyp- sies—Cheating by False Tokens—Gaming—Trial of Trea- son Committed in Wales, and Committed Out of the Realm—

	PAGE
Trial of Piracy — Trial of Bloodshed in the Palace — The Benefit of Clergy taken Away — The Question of Clergy Debated before the Council — The King's Determination — Abjuration and Sanctuary — Clergy Again Taken from Certain Offenders — Sanctuary Taken from Certain Offenders .	412-472

CHAPTER XXX.

HENRY VIII.

Leases for Years and at Will — Leases by Tenant for Life, etc. — Of Fines — Manner of Suffering Recoveries — Uses — A Use in Tail — Operation of the Statute of Uses — Covenants to Raise a Use — A Lease and Release — Construction of Wills — The Court of Chancery — Court of Requests — President and Council of the North — Action of Covenant — Of Assumpsit Against Executors — Of Trover — Debt and Accompt — The Criminal Law — Of Trials in Two Counties — The Ecclesiastical Court — King and Government — Bills of Attainder — Torture — Of the Statutes — Of the Year-Books — Fitzherbert — Saint Germain — Rastell — Printing of Law-Books — The Register — Miscellaneous Facts . . .	473-579
---	---------

HISTORY OF THE ENGLISH LAW.

CHAPTER XXIV.

EDWARD IV. (a), EDWARD V., AND RICHARD III.

STATUTES OF EDWARD IV. — THE JURISDICTION OF THE SHERIFF'S
TOURN RESTRAINED — GAMING — STATUTES OF RICHARD III. — BAIL-
ING FELONS — USES — FINES — RECOVERIES — TALTARUM'S CASE —
USES — CONTRACTS — EQUITY — THE CRIMINAL LAW — TREASON —
LARCENY — APPEALS — PROVORS — BATTEL — SANCTUARY — CLERGY.

IN the reign of Edward IV., the parliament seemed to be principally taken up with the arrangement of the commercial system (b). Many statutes were made for the regulation of import or export,

*Statutes of
Edward IV.*

(a) It had been intended that this volume should commence with the reign of Henry VII., as marking the commencement of a new era in our legal and constitutional history; but, upon a close study of the legal history of this reign, it was considered that the principles of law and government which marked the legal history of the country under the sovereigns of the Tudor dynasty, and the causes which led to their ascendancy, were completely in operation during the reign of Edward IV., and the brief reign of Richard III., which, in this light, may be regarded as only the continuation of it, so that it is this reign which ought really to be regarded as the opening of a new era in our history — an era characterized by the complete ascendancy of the regal power, and the rise and growth of arbitrary power; and it appeared therefore convenient and natural to distinguish it by making it the subject of a separate chapter, and likewise to make it the opening of a new volume. The object has been in this edition to make the division into volumes as much as possible correspond with the distinction of eras in our legal history; and from the accession of Edward IV., to the end of the long reign of Elizabeth — where our author closes his history — it will be found that the character of our laws and constitution was substantially the same.

(b) This chapter commences rather abruptly, because, for reasons already suggested, it has been severed from, or out of, several in which the author had blended together the reigns of Henry VI. and Edward IV. It has been already seen that in c. xx., and the two following chapters, the author had thrown together the statute law and the judicial decisions of the two reigns of Henry VI. and Edward IV., which occupy a period of about sixty years in our history, while he had devoted a separate chapter — though only of a page or two — to the nominal reign of Edward's infant son, and the brief reign of his brother Richard III. The reason given by the author for blend-

and for the management of trade and manufactures at home. Among these may be ranked some sumptuary

ing the two reigns of Henry VI. and Edward IV.—that the alterations made by parliament were not so interesting or important as to give a distinguishing judicial character to either of those reigns—has already been seen to have been singularly unfounded as regards the reign of Henry, which was marked by some statutes among the most important incidents of our legal history. And though the reign of Edward IV. was not so marked by legislative measures of importance, the course of legal practice, and the tendency of judicial decisions in his reign—resulting from causes having their origin in its nature and character—led naturally, in the brief reign of his brother, naturally connected with his own, to more than one of the most important measures that ever marked our legal history. The notion that it was Henry VII., who had commenced that stern, sagacious system of rule which was founded on the exaltation of the royal power, and tended to keep all others in subjection to law, originated, no doubt, in Lord Bacon's *Life of Henry VII.*, in which he does his best to aggrandize the fame of that monarch, and to keep out of view the measures or the merits of his predecessor, from a motive he almost avowed in his servile dedication to James I.: "I have therefore chosen to write the reign of Henry VII., who was in a sort your forerunner, and whose spirit, as well as blood, is doubled upon your Majesty." It is obvious that his object was as much as possible to exalt the character and power of Henry VII., as the founder of a dynasty, to the inheritance of which the sovereign he sought to flatter had succeeded. In a dynastic and political, as well as in a constitutional or legal point of view, the reign of Edward IV. is to be regarded as having commenced a new era in our history. Lord Bacon, in his *History of Henry VII.*, eulogizes the sagacity of that sovereign in uniting, by his marriage with the daughter of Edward IV., the two houses of York and Lancaster, and thus creating a sure title for his successors, who, be it borne in mind, were by this marriage the descendants of Edward IV., so that he, as well as Henry VII., may be regarded as the founder of the dynasty which succeeded him. In the preamble of the statute (very likely drawn by Lord Bacon), in which, on the accession of James I., his title to the throne is artfully stated, it is thus recited: "Great and manifold were the blessings wherewith Almighty God blessed this kingdom and nation by the happy union and conjunction of the two noble houses of York and Lancaster, thereby preserving this noble nation, formerly torn and almost wasted with long and miserable dissension and bloody civil war; but more inestimable blessings are thereby poured out upon us, because there is derived from the union of those two princely families a greater union of two mighty kingdoms under one imperial crown, in your most royal person, who is lineally, rightfully, and lawfully descended of the Lady Margaret, eldest daughter of the King Henry VII. and the Princess Elizabeth, his wife, eldest daughter of King Edward IV." (2 *James*, c. i.) And this consideration derived more importance from the undoubted fact, which Lord Bacon, even in his *History of Henry VII.*, does not disguise, that, in the opinion of the country, the house of York had the true title to the throne, which probably no lawyer could deny, so that it was in truth from Edward IV. the Tudor dynasty derived their title, as it was from the complete ascendancy he had acquired over the aristocracy that they derived their security. Thus it was that he, having acquired the throne by force of arms, and also with right of descent, united the two titles of right and conquest, which most securely found a dynasty, and in the union of which is certain to be laid the basis of arbitrary power. This characteristic of the reign which, for the same reason, at once distinguished it from the

laws, which limited the expense and fashion of dress to be worn by different degrees of persons.¹ Very few al-

previous reigns, and identified it with those which ensued, pre-eminently required that it should be distinctly and separately treated, and also that it should be made the opening of a new volume, as it was undoubtedly the opening of a new era. And to have blended it with the entirely different reign of Henry VI., was surely an inconvenient and unaccountable error. How immensely the country had retrograded in point of liberty, and how completely this was an age of regal tyranny, may appear from a simple comparison of this reign with that of the last sovereign of the old race, before the accession of the Lancastrian dynasty in the early part of the preceding century. Sir J. Mackintosh says truly that "after the accession of Richard II., there are no examples of any pretension to lay new and general taxes on the people, otherwise than by the estates of parliament. The parliamentary power of the purse, though often eluded by various decrees, was, in the year 1400, as much an acknowledged principle of the legal constitution as it now is. The right of the commons to appropriate supplies to specific services, first regularly introduced in the minority of Richard II., was exercised without resistance under the parliamentary king. In this reign, as well as in that of his son, parliaments were almost annually holden." "The memorable reformation of 1406, which required the king to govern the realm by the advice of a parliament council, who, being present, took an oath in parliament to observe and defend the reformed institutions, has been justly characterized by the highest authority as a noble fabric of constitutional liberty, hardly inferior to the petition of right" (*Hallam's Middle Ages*, i., 302; *Mack., Hist. Eng.*, v., 1). The head of the house of Lancaster, Henry IV., had undoubtedly acquired and challenged the realm by conquest. Therefore, although that title was not in terms pressed upon or recognized by parliament, it was in reality relied upon and upheld in that king's reign by force of arms, though he, from policy and weakness of title, did not avow it; and he did not openly assert, though he exercised, absolute power, because he, from policy, and his successor, Henry VI., by reason of weakness, desired not to do so, and relied rather upon consent than conquest. But Edward IV. had acquired the throne by force of arms, and at the same time had a rightful title, and he forthwith asserted and exercised absolute power. Nor can anything be more marked or more remarkable than the contrast between the character of his reign and that which has been described in the reign of the last sovereign of his house, Henry VI., as the true and proper character of the rule of an English sovereign. Fortescue, in his treatise, *De Laudibus Legum Angliæ*, had laid it down as a first principle that a king is appointed to protect his subjects in their lives, liberties, and laws, and for this end has the delegation of power from the people, and has no just claim to any other power. A contrast is drawn between the rule of the kings of England and the exercise of absolute power, and it is declared that the king cannot alter the laws without the consent of parliament, nor depart from the laws, on account of the free form of government which existed. Such was the theory. But not a word of this did the parliament venture to assert on the accession of Henry VII., infirm as his title was in point of law. Indeed, that very infirmity showed that he really had the crown by conquest; and as he had *acquired* the sovereignty by force of arms, so it was foreseen that he would *maintain* it in the same way, and reign, in fact, by means of terror. In this and the ensuing reigns, indeed, parliament was reduced to a state of the most perfect subserviency, and all these salutary

¹ Stat. 3. Edw. IV., c. 5; stat. 22 Edw. IV., c. 1.

terations were made in the law of property, or the administration of justice.

principles were utterly set at nought. Parliament afforded no protection to the people, so that the courts of law were equally servile, and were the mere executioners of the king's will, insomuch that no men's lives would be safe who should even speak against, much less venture to oppose him. The king was absolute, and this reign commenced the era of arbitrary power. His father gained the throne by a battle, and soon afterwards died, and his son succeeded by descent and also by force of arms, and dated his complete title from the time when he thus first got possession of the throne by force of arms. This formed the dividing point between his reign and that of his predecessor, and it was so treated in the courts of law, as well as in parliament. It has been already shown by a case from the Year-Books of the latter reign that in those times, at all events, the two reigns were distinguished very clearly (*Year-Book, 7 Edw. IV., fol. 6*). That case shows that, from the year 1460, when Edward IV. deposed Henry VI., and was proclaimed as and assumed the actual power of king, the courts of law reckoned his reign to commence; and as it happened that his father, the Duke of York, in whom the title, as between him and Henry, was alleged to have been, had died in that year, it follows that the reign of Edward could not have commenced until then, while, on the other hand, as Henry never, except for a very brief interval, re-acquired even a nominal sovereignty, it is equally clear that in that year the reign of Henry VI. ended and the reign of Edward IV. began. And as the one reign had lasted nearly forty years, and the other lasted above twenty, there appears no reason for mixing them up together; and, on the contrary, as each was marked by many important changes in the country, there are abundant reasons for distinguishing them. At the accession of the king a statute was passed to declare what acts done by the late kings, Henry IV., V., and VI., or during their reigns, under their supposed authority, should be good, and what not. To prevent doubts, it was said as to judicial acts done in the time of Henry IV., V., and VI., "*lately in fact, and not in right, kings of England,*" it was enacted that all fines, recoveries, and judgments in any courts of record during their pretended reigns should be good, and all liberties granted to corporations, and all licenses of alienation, or licenses to found any spiritual house, or guild, or fraternity, or to give any lands to them, or license of appropriation, or to make elections, or restitutions of temporalities, or collations, gifts, and presentations to benefices during the incumbents' lives, and all grants of fairs and markets, and all grants of wards, and marriages, and feoffments, upon trust to the late king, to the use of others, and all commissions of judges, or commissions of sewers, and grants to abbots, etc., to make free elections (*1 Edw. IV., c. i.*). This was enacted in the first year of the reign of King Edward IV., and in the year of our Lord 1461. Thus, at the outset of the reign, it was made obvious that it was a re-conquest from a sovereign, and a dynasty, for several generations in actual possession of the crown. Probably there are not in the whole of our annals two reigns which, in their character, were more unlike than those of Henry and of Edward. One of the most interesting aspects of legal history is the exposition of the causes which led to changes of laws or institutions, and in this respect the reign of Edward IV. was, as will be found, one of the most fruitful of results, and will be seen to form a remarkable era in our history, and to mark the rise of arbitrary power. And, further, it will be found that the same causes which made this the ruling character of the reign, and of the rule which it established, had their influence on the whole law and legislation of the age, and gave them a tendency which, under a new dynasty, governed them for

In one instance, a revolution was effected in an ancient branch of our judicial establishment, which from thence

more than a century. These causes had their origin in the civil wars, the Wars of the Roses, which had so long desolated England, and in the results to which they had led, the destruction of the nobility, the prostration of the nation, and the acquisition of the crown by force of arms, so as to give it much of the character of a conquest, or re-conquest of the country. In the note to the reign of Henry IV. it has been seen that he was the first sovereign after the Conqueror who had acquired the crown by force of arms, and that he really ruled by the same means, so that his reign had much of the character of conquest, and, had it been longer, would have resulted in arbitrary power. Foreign wars or civil dissensions had distracted his successors, and in the meantime, amid these distractions and dissensions, which divided the aristocracy and weakened the crown, the power of parliament had begun to arise. "That assembly," observes Hume, "was beginning to assume great authority. The commons had it much in their power to enforce the execution of the laws, and if they failed of success in this particular, it proceeded less from any exorbitant power of the crown than from the licentious spirit of the aristocracy, and perhaps from the rude education of the age, and their own ignorance of the advantages resulting from a regular administration of justice" (*Hist. Eng.*, vol. iii., c. xxi.). But with the accession of Edward IV., all this was utterly changed. This resulted from the manner in which he acquired the throne, which was by force of arms and the terror of martial law. After a bloody victory, numerous persons of distinction were executed by martial law (*Ibid.*), and then "a parliament was summoned for settling the government" (*Ibid.*). "On the meeting of this assembly," pursues the historian, "Edward found the good effects of his vigorous measures in assuming the crown, as well of his victory, by which he had secured it. The parliament no longer hesitated; they recognized his title, and declared the sovereigns of the previous dynasty usurpers, and, with the exception of some judicial or legal acts, disaffirmed all the acts of their parliaments, and passed a host of attainders against their adherents, though their sole crime was the adhering to a prince whom every individual of the parliament had long recognized" (*Ibid.*). The result of thus "subverting," as the historian expresses it, "such deep foundations," and basing the sovereign power so entirely upon the sword, was in effect to establish arbitrary power. The necessity of supporting the government thus established led to numerous executions by martial law, even some time after civil war had terminated, and for mere correspondence with the king's enemies. "This introduction of martial law into civil government was," observes the historian, "a high strain of prerogative" (*Ibid.*). It was impossible but such a great and sudden revolution would leave the roots of discontent, which it would require great violence to extirpate, and such violence was suited to the genius of the nation in that age (*Ibid.*). In a note the historian; in order to show the arbitrary character of the kind of rule thus established, refers to the patent of constable and marshal granted by this monarch, which runs thus: "Plenam potestatem damus ad cognoscendum et procedendum in omnibus causis et de super crimine lesse magistratis seu super occasione cæterisque causis, etc., etiam summarie et deplano, sine strepitu et figura justitiæ, sola facti veritate inspecta, ac etiam manu regia." The historian observes: "The office of constable was perpetual; its jurisdiction was not limited to times of war, as appears from this patent, and its authority was in direct contradiction to Magna Charta, and no regular liberty could subsist with it. It involved," he adds, "a full dictatorial power continually subsisting in the state." Such was the character of the rule established by Edward

began to go almost wholly out of use. This was by stat.

The jurisdiction
of the tourn re-
strained.

1 Edw. IV., c. ii., which took away from the
tourn the power of hearing and determining,

IV., and it will be seen how utterly unlike it was to the rule of Henry VI. and his predecessor, which, as far as the crown was concerned, was mild enough, and under which indeed the power of the state was really wielded by the leading noblemen. It would be impossible to imagine any two reigns more utterly unlike each other than those of Henry VI. and Edward IV.; while on the other hand, the character of the rule of Edward was entirely the same in this respect as that of his successors, whether of his own dynasty or that which succeeded it; and from the time of his accession to the close of the reign of Elizabeth, arbitrary power by the crown was exercised. This, therefore, was undoubtedly the opening of a new era in our legal history, fraught with most momentous consequences. The distinctive characteristic of the era is the absolute ascendancy of the royal power in the state. From the accession of Edward I. to the reign of Edward IV., there had been one long struggle between the crown and the aristocracy, and the crown had now gained the ascendant. The great feature of the present era was the utter disappearance of the last traces of the old Saxon element of freedom in our government, if not in our constitution. That element, indeed, still remained nominally embodied in the great institutions of the jury and of the House of Commons; but for the present they were practically subdued, though not subverted, by the enormous pressure of the royal power; and practically the monarchy was absolute. The great lesson to be learned from this era in our legal history is the necessity of an aristocracy for the protection of the nation from the tyranny of royalty. The previous age had taught the lesson of the importance of the supremacy of royalty for the protection of the people from the oppression of an aristocracy. The nation was now to learn the evils arising from the absolute ascendancy of royalty, and the absence of all check or control upon regal power. "The Norman conquest," observes the historian, "threw more power into the hands of the sovereign, which, however, admitted of great control, though derived less from the general forms of the constitution, which were inaccurate and irregular, than from the independent power enjoyed by each baron in his particular district or province. The establishment of the great charter exalted still higher the aristocracy, imposed regular limits on royal favor, and gradually introduced some mixture of democracy into the constitution. But even during this period, from the accession of Edward I. to the death of Richard III., the conditions of the Commons was nowise eligible. A kind of Polish aristocracy prevailed, and though the kings were limited, the people were as yet far from being free. It required the almost absolute authority of the sovereign, which took place in the subsequent period, to pull down these disorderly and licentious tyrants, who were equally averse from peace and from freedom, and to establish that regular execution of the laws which, in a following age, enabled the people to erect a regular and equitable plan of liberty" (*Hist. Eng.*, c. xxiii.). The historian, it will be noticed, dates the era of arbitrary power from the death of Richard III. and the accession of Henry VII.; but the principles of government which he pursued, and the system of rule he carried out, had commenced their operations in the reign of Edward IV. Thus it was as to the exaltation of the royal power by the repression of maintenance or combination of retainers of great men. The historian, in his review of the laws of the next reign, says: "There was scarcely any session during this reign without some statute against engaging retainers, and giving them badges or liveries,

and transferred it to the quarter sessions. The tourn was the great criminal court of the Saxons,¹ which had given

a practice by which they were in a manner enlisted under some great lord, and were kept in readiness to assist him in all wars, insurrections, riots, violence, and even in bearing evidence for him in courts of justice. This disorder, which had prevailed during many reigns, when the law could give little protection to the subjects, was then deeply supported in England, and required all the vigilance and rigor of Henry to extirpate it" (*Ibid.*). But the acts passed in the next reign on the subject only amended or extended the earlier statutes against liveries and retainers which were enforced under Edward IV. These statutes show a settled design to repress dangerous combinations and gatherings of retainers, which were fatal to the public peace. It was in this reign commenced the execution of those statutes passed for the repression of all power of resistance to the royal power, which has usually been supposed to have specially characterized the reign of Henry VII. In other reigns we find, for instance, that the statutes of liveries, that is, the acts directed against the maintenance by the nobility of bands of retainers in their liveries, began to be enforced. The statute seems before this reign to have been a dead letter, but we find very early in this reign that indictments were presented upon it (*Year-Book*, 4 *Edw. IV.*, fol. 31), and in order to render such proceedings more effective a statute, above mentioned by our author, was passed to provide for their presentment at the sessions instead of before the sheriff. The only important statute which marked this reign in legal history was the change from the Saxon tourn to the modern system of justices of the peace; a statute passed in the first year of this reign to take from the sheriff and the tourn the power of presentment for felonies or crimes, and transfer the jurisdiction to the justices of the peace in quarter sessions (*Year-Book*, 22 *Edw. IV.*, fol. 24). This was the demolition of the last trace of old Saxon institutions, that is, the institutions distinctively Saxon; and its tendency to establish peace, and to augment the royal power is obvious. It would be impossible to mention any change more characteristic of altered times, a new era, and the approach of a different age, than the change from the ancient Saxon tourn to the modern quarter sessions. And here, again, we may observe how curiously diverse were the results which followed the establishment of a state of peace by means of the ascendancy of the royal authority. There is little doubt that one of the evident results was that development of legal rights and remedies which, in this reign, led to the recognition of the legal rights of copyholders (*Year-Book*, 7 *Edw. IV.*, fol. 19; 21 *Edw. IV.*, fol. 80). There is a legal tradition, too, that in this reign the specific legal remedy for the recovery by leaseholders of their terms was first judicially recognized (*Hale's Hist. of Com. Law*). And there has always been another tradition of the law, that in this reign recoveries, as modes of barring an estate-tail, were judicially recognized. And, although both these traditions are erroneous, there is so far a foundation for them that they seem to signalize the reign. As regards the latter, fines and recoveries had long been used as means of conveyance, and chiefly for the purpose of conveyances to uses; and there can be no doubt that the state of peace established in the reign of Edward IV., led, under Richard III., to the two important statutes as to fines and as to uses which were carried into the legislation of subsequent reigns, and formed the basis of our modern system of uses, of wills, and of limitations. For, as Lord Bacon says, speaking of the statute of fines re-enacted under Henry VII., "Statutes of non-claim are fit for times of war, when men's heads are troubled so that

¹ *Vide* vol. i., 177.

place in some degree to the justices of gaol-delivery, and of oyer and terminer, after the Norman policy began more

they cannot attend to their estates; but statutes that give possession are fittest for times of peace, to extinguish suits and contentions, which is one of the banes of peace" (*Hist. Hen. VII.*, 44). Lord Bacon does not mention that the statutes of Henry VII., as to uses and fines, had their originals in statutes passed under Richard III.—no doubt in consequence of judicial decisions in the reign of Edward IV., for in that reign there were numerous decisions upon both these subjects. Lord Bacon, although a partisan of the House of Tudor, admitted indeed, no doubt alluding to these statutes, that the king (Richard III.) was a good law-maker (*Ibid.*, 3). And one of them led the way to the statutes of uses and of wills under Henry VIII., and the other was the precursor of the statutes of limitations which settled men's possessions. The mode in which these results ensued will be explained in the notes to the reign of Henry VII. and Henry VIII. For the present it is enough to point out that, in the judicial decisions of the reign of Edward IV., and the statutes of Richard III., are to be found the causes of these momentous changes in our law. There can be little doubt that the occasion of the making of the statute of fines in the 2 Richard III., was the remarkable case of the prior of Merton, which was decided in one of the last years of Edward IV., and was carried into a court of error in the 2 Richard III., and in which a fine, levied so long ago as the reign of Henry III., was sought to be executed. Although the judgment in error is not stated, there is reason to believe the judgment of the court below in favor of the fine was reversed (*Year-Book*, 21 *Edw. IV.*, fol. 61; 2 *Rich. III.*, fol. 12). From the language used in the course of the long and protracted arguments of the case, it may be inferred that the extreme antiquity of the fine in question had made a strong impression as to the importance of upholding such ancient assurances; and hence, it is probable, the statute of Richard III., which was passed the very year that case came into error. This is an illustration of what will be constantly observed in the legal history of these ages—the manner in which legislation grew out of the development of law by judicial decisions; and it also affords an adequate reason for connecting together the law and legislation of the reign of Richard III. with that of Edward IV. It has already been mentioned that the key to the history of this reign, and not less its legal than its general history, is the disastrous result of the wars of the Roses. And it is curious to observe how social or political causes tend to produce changes in the laws. No one would suppose, for instance, that the wars of the Roses would have had any influence upon our system of conveyancing or the development of equity, and yet nothing is more certain than that they had those results. Long ago this was pointed out by Lord Holt. Our author himself observes very truly: "In the course of the long contention for power between the houses of York and Lancaster, some motives might contribute to promote such an attempt. An impoverished gentry, and a nobility exhausted by the expenses of the field, were eager to obtain a power or full dominion over their property" (c. xxi.). So as to uses: "They were not carried to any very great extent till the civil dissensions between the houses of York and Lancaster made it necessary to find out some method of conveying and concealing real property from the reach of debts and forfeitures. The forfeitures which then threatened the nobility made them resort to uses, as the most convenient mode of sheltering the lands from the consequences" (*Ibid.*). There can be no doubt that uses were thus made the means of avoiding forfeitures. This might be illustrated by many cases from the Year-Books of the reign. Thus in the 5 Edward IV. there is this case: Richard, Earl of Warwick, had issue three children,

generally to prevail. Since justices of the peace had been invested with so much authority, this court had been still

and enfeoffed J. Hickford and others for performance of his will, and made a will and declaration, and died. His heir also died, the will not performed, and a question arose as to a suit in equity to execute the will (*Year-Book*, 5 *Edw. IV.*, fol. 8). Two or three years before this the Earl of Northumberland had been attainted (1 *Edw. IV.*), and forfeited all his lands, and (3 *Edw. IV.*, 25) Lord Hungerford was also attainted and executed in the 1 Edward IV.; and upon an inquisition it was found that certain persons were seized to his use of certain lands, and as the act of attainder expressly forfeited all lands of which he was seized, or others to his use, these lands were seized by the king. But the feoffees, on the part of Lady Hungerford, raised this question in the exchequer chamber, whether they could not traverse the inquisition, and show that they were seized to the use of Lady Hungerford after the attainder and death of Lord Hungerford, and that therefore the act of attainder did not forfeit the lands in question? The matter was much debated by the judges, and in the result, they decided in favor of the crown, that is, that the feoffees were not entitled to traverse, but those to whose use they were enfeoffed were entitled to the advantage of it if it lay (*Year-Book*, 6 *Edw. IV.*, fol. 29), a decision, it is manifest, strongly showing the advantage and importance of these feoffments to uses. It is also manifest that, as already observed, there was an intimate connection between the practice of conveyances to uses and the exercise of that equitable jurisdiction by which alone the uses could be protected and enforced. The earliest cases of equity about uses, and the close connection between uses and equity, is shown by the language of the court in a case in one of the earliest *Year-Books* of the reign, where it is said, that in the case of a feoffment to uses in the chancery, a man shall have his remedy according to the intent of the feoffment and according to conscience (*Year-Book*, 4 *Edw. IV.*, fol. 8). Thus it is manifest that the earliest exercise of equitable jurisdiction was in upholding and protecting uses; and as uses became general in consequence of the wars of the Roses, so the rise of an equitable jurisdiction was in a great degree to be ascribed to the same cause. There were other important legal changes which were the indirect result of the state of things caused by the wars of the Roses. That prostration of the aristocracy and ascendancy of the royal authority which they brought about, tended to the growth and strength of legal rights, and the recognition and the management of proceedings which gave them settlement and stability. Thus it was that, in the reign of Edward IV., took place several important developments of legal rights by judicial decisions or legal practice—more than one of which, in the brief reign of Richard, became the subjects of legislation. That brief reign is really to be regarded, in legal history, a prolongation of that of Edward, and the measures which marked it were really the result of causes which had been at work during the previous reign. The great character of the age which had now opened and the era which had now arrived was the ascendancy of the lay power, represented by the crown, and the rapid diffusion of knowledge and intelligence on all subjects, and especially the law. For the present, as the crown was also in the ascendancy of the lay element, the constitution produced no advantage to freedom; regal tyranny was but substituted for ecclesiastical authority; and it was a century ere the pressure of that tyranny produced a reaction which resulted in another great revolution in favor of the freedom of the people. But for the present, and throughout that century in our legal history which is covered by this and the following volume, that is, from the accession of Edward IV. to the end of the long reign of Elizabeth, the characteristic of the constitution is the absolute ascendancy

less resorted to. This want of employment induced the persons interested in the support of these courts to try unfair means to supply the loss of their profits.

of the royal power in the state, and the complete prostration of every other, including that of the church. This characterizes the reign of Edward IV. for the first time in our history, and therefore it is that his reign opens a new era in our legal and constitutional history. It is convenient, considering the nature of the revolution commenced and consummated in this age under the Tudor dynasty, that this volume should include the chapters in which our author expounded the nature of ecclesiastical law and jurisdiction, especially as the treatise of Lyndwoode in this reign first collected and embodied the ecclesiastical laws of the country, and the study of them is necessary to enable the reader to understand the practical operation of the relations between the ecclesiastical law and the civil at the opening of the reign of Henry VIII. There was now a rapid development of legal principle by judicial decisions, and the consequent development of law. The Year-Books of the reigns of Edward IV. and Richard III. show a vast advance in legal knowledge, and to this several collateral causes greatly contributed. Law officers of the crown, attorney-general and solicitor-general, were in this reign regularly appointed. The great treatises by Littleton on the common law and Lyndwoode on the canon law would alone have illustrated the reign and marked an era in legal history, and the application of the new invention of the press to the printing of law-books marked that union of intellectual power with legal knowledge which, in the course of another generation, was destined to effect a momentous revolution in our law and constitution. Regarding these reigns as being really for the purposes of legal history, one, there is no reign in our annals marked with a more distinct character, or pregnant with more momentous consequences. That object which Edward I., at the opening of that era in our legal history which is signalized by his name and reign, had proposed to himself, and had only in part attained, and in pursuit of which his successors had suffered such severe struggles and rendered such disastrous defeats, the establishment of the ascendancy of the royal authority, was now completely achieved by Edward IV.; the aristocracy lay prostrate, parliament was subservient, the nation subdued, and the power of the crown virtually absolute. The result of all these causes was beginning in this reign to tell even upon the power and privileges of the church. And among the many features which rendered this reign remarkable was the indications observable of a tendency to limit the papal and extend the royal supremacy. Thus, in this reign, it was laid down in a court of law that *præmunire* would lie against a clerk who sued a man at the court of Rome in a spiritual matter, where he could have a remedy in the court of his ordinary (*Year-Book, 9 Edward IV.*, fol. 3); which in effect went to prohibit appeals to Rome, even in spiritual matters, for the reason given was that he drew a plea *extra regnum* (*Ibid.*). In the same year *præmunire* was brought by an abbot against one lately a monk of his convent, who pleaded that the abbot was excommunicated, and that the suggestion to the pope was, that it appeared that whereas he was provided to the abbey to have the rule of it, the plaintiff intruded, and upon this suggestion he had a bill of delegacy against certain persons, so it appeared that the suit was for spoliation done to him, which was a matter suable in the court Christian and not in the temporal court, so that the suit was not contrary to the statute. And the plaintiffs said that the matter in the monastery was a personal tort, of which an action lay in the king's

This appears from the preamble of the act, which states the reason for the change it was going to make, in the fol-

court. And it was touched upon that he could show the effect of the bulls in his pleading (*Year-Book*, 9 *Edw. IV.*, fol. 3). The ultimate result of the case does not appear, but enough is stated to show that the operation of the statute of præmunire was to render it very difficult for any ecclesiastic to appeal to Rome in any matter however spiritual in its nature, if at all connected with temporality or any legal right, for it was hardly possible that a matter should arise which was not more or less mixed up with temporality; and then, as the king's court claimed jurisdiction, the resort to Rome was within the penalties of præmunire. The policy of Edward was carried out by his brother. A case of præmunire on account of an appeal to Rome occurred in the brief reign of Richard III. In the king's bench, a bill in the nature of a præmunire was sued against one Piers Peckham, by one Sandes, who alleged that Peckham had sued a relation in the court of audience against Sandes to have the goods of one Longbottom, lately deceased, and had appealed to the court of audience at Rome. Peckham pleaded that he was executor, and that Sandes claimed to be executor under another will, and that he went to the court here to prove the will, but that he could not get justice, and therefore appealed to Rome, merely to get the will proved. It appeared to be considered that this was a defence, as it was not a suit for the goods, but only to establish the will and testament were of spiritual cognizance (*Year-Book*, 2 *Rich. III.*, fol. 91). Then Sandes, having failed in the præmunire, tried an action of trespass, in which Peckham pleaded he sued in the court of audience of Canterbury to have the testament of the plaintiff revoked and annulled. The judge would not do him his right, whereupon he appealed to the court of Rome, according to the law of holy church, to have the testament defeated, and afterwards there came a delegacy from Rome to the said court to annul the will, whereupon it was annulled accordingly. To this the plaintiff demurred, on the ground that the judgment of the court of Rome should not prejudice a man at the common law; for if it should be certified that a man was excommunicated in the court of Rome, that should not disable him here; and the court appear to have been of that opinion, although one judge thought the latter part of the plea very good, which alleged the judgment of the ecclesiastical court of Canterbury (*Year-Book*, 2 *Rich. III.*, fol. 23). It had come to this, therefore, that not only the sentence of the court of Rome, but a sentence of excommunication by the see of Rome, so far as they could have any legal force or effect, were set at naught by our courts at law. And it had already been laid down in the previous reign, that even in a spiritual matter, if there could be no remedy here, there could be no recourse to Rome without incurring the penalties of præmunire. It is true that this did not apply where there was an appeal to Rome, as there was in all ecclesiastical cases in which the ecclesiastical courts themselves were not restrained by prohibition. But then it lay with the king's courts thus to restrain them on the ground that the same was in the temporal courts, and in such cases, of course, an appeal to Rome would not be allowed; and thus the courts in effect claimed to limit the exercise of the papal supremacy in matters ecclesiastical or spiritual mixed with temporal. Other cases showed an equal tendency to augment the extent of the royal sovereignty in such cases. In the course of the reign a remarkable case occurred, which raised the question of the power of convocation, and is thus reported in the *Year-Book*. In the exchequer chamber, before all the justices and barons of the exchequer, the case was this: The clergy of the province of Canterbury, at their last convocation, had granted to the king a tenth payable, and in the same grant

lowing words: "Because, by the inordinate and infinite indictments and presentments, as well of felony, trespass, and offences, as of other things, which had of long time been taken before sheriffs in their counties, under-sheriffs, their clerks, bailiffs, and ministers, at their tourns or law-

had made provision, that after the bishop had returned a collector to the exchequer, that he should not be repelled, and that the barons of the exchequer should not make process to certify any other, notwithstanding any charter of exemption. The Bishop of Winchester returned the Abbot of Waltham as the collector, but he set up a charter of exemption from such office; to which it was objected that he could not set it up, for that he had been one of the clergy who granted the tenths, and was party and privy to the grant, with the proviso that no exemption should be taken advantage of. And it was contended that as to the clergy the convocation was as powerful as the parliament regarding the temporal. One of the judges, however, took a different view, and urged that the convocation had no power to bind any temporality, but that which was spiritual, *i. e.*, to ordain fasting-days, holidays, etc., for they were only spiritual authorities, and that the letters-patent of the king were merely temporal; and that the spiritual judges had not power to allow or disallow them. Another judge — Starkey, who had been recorder in London — said that the charter of exemption ought to be allowed; for otherwise, the effect would be to affirm the jurisdiction and authority of convocation to be higher and of more authority than that of the king in his prerogative, which was contrary to truth, for an act done in the convocation was subject to the power and authority of the king, in which the judges agreed. It was further said, that though the convocation was spiritual, and all their acts, yet that the grant of a tenth was a temporal act, and so of its collection. This view was taken by the court, though for default of pleading the defence was not allowed on this occasion (21 *Edw. IV.*, fol. 45). In the course of this reign, again, various cases betrayed a disposition on the part of the courts of law to restrict the jurisdiction of the ecclesiastical courts as much as possible, and the rule was rigidly enforced that if there was a remedy at common law, or if there would be any interference with the common law jurisdiction, the courts of law would issue prohibition. Thus it was laid down, that if a man swore to another to pay a sum of money, and the other sued in the spiritual court, prohibition would be; for where the common law may meddle, the spiritual court shall not (*Year-Book*, 22 *Edw. IV.*, fol. 20). And when the Abbot of St. Alban's, as was alleged, had kept a married woman in his room for some time against her will, and the husband spoke about it, the abbot sued him in the spiritual court for scandal, the court of law granted prohibition, because the husband might have action of false imprisonment (*Ibid.*). Thus the tendency of the law of this reign was in the direction it afterwards took in the reign of Henry VIII. That reign had, in many respects, a remarkable resemblance to the present; the change of dynasty produced, indeed, no change in character or policy of the system of rule exercised by the crown. On the contrary, Henry VII. followed out, as Richard III., his immediate predecessor, had done, the policy of Edward IV.; the law and legislation of Henry VII. carried out the legislation of Richard III., which was based upon the law and legal development of the reigns of Edward IV.; and Henry VIII. and his successors, it will be seen, did but uphold, and exercise, and carry out the same policy and the same system and rule. In every respect, therefore, and in every point of view, the reign of Edward IV. forms a great era in our legal history, which deserves a separate, distinct, and careful consideration.

days; which indictments and presentments were oftentimes affirmed by jurors having no conscience, nor any freehold, and little goods, and often by the said sheriffs' menial servants and bailiffs, and their under-sheriffs; by which indictments people were attached and arrested, and put in prison, and constrained to make grievous fine and ransom; after which they would be enlarged,¹ and the indictments embezzled and withdrawn:" the act therefore ordains in future, that the above persons should not have power to arrest any one, or levy fines by color of indictments so taken; but they should deliver all such indictments to the justices of the peace at their next sessions of the peace, under the penalty of forty pounds. The justices were to award process thereon, the same as if the indictment was taken before them, and to arraign, and deliver or fine the defendants. The estreat of such fines was to be delivered to the sheriff, who was to forfeit one hundred pounds if he arrested, put in prison, or levied any fine before he had process from the justices. This act did not extend to the sheriffs of London, nor to any indictment taken within that city. Thus did the quarter sessions rise in consequence upon the destruction of the tourn (*a*).

(*a*) This was one of the most important of those great practical changes in our constitution which have a greater effect upon the course of life and the common affairs of a people than measures of a more imposing character. The change from the "tourn" to the court of quarter sessions marked a silent social revolution, and the very terms themselves — the one as ancient as the time of the Saxons; the other, as modern as our own age — indicate the nature and character of the change. It should seem that the statute rather had in contemplation indictment for crimes or offences of a really criminal character, than in presentments for offences of a civil character, such as nuisances, or non-repair of roads, etc. For in the Year-Book of the second of Edward IV., after this act, there was a case in which it was said that presentment at the tourn was the remedy for encroachment upon or obstruction of a highway. Littleton there said: "The highway is the king's," and Moile, J., said, "If a purpresture shall be made upon it, or a trench, or a wall over it, it shall be punished in the tourn or the leet, and shall be laid as, 'ad nocumentum totius populi Domine Regis'" (2 *Edw. IV.*, fol. 9). So in another case, in the fifth year, it was held that if a common highway was out of repair, and a man lost his horse in it, the remedy was so (5 *Edw. IV.*, fol. 2). Thus also, in the same year, it was said that if a common innkeeper (hostler) would not receive a guest, he should not have an action, but "complain to the ruler of the vill" — *i. e.*, the head borough, or other officer of the vill — (5 *Edw. IV.*, fol. 2), that is, because it was a matter which concerned the community. In a highway, or "*regia via*," it was said, the king had right of passage for himself and his people; and if a trench should be made

¹ *Vide ante*.

The administration of civil justice in one particular instance was regulated by stat. 17 Edw. IV., c. ii., relating to the court of *Piepowder* (a). This court was for the de-

in it, the king should punish the nuisance (8 *Edw. IV.*, fol. 9). And in the twenty-second year of the reign, a presentment (of rape) taken before the sheriff in his tourn, was returned in the king's bench: and Hussey, Chief-Justice, said it was void (22 *Edw. IV.*, fol. 22). And it was said that if the sheriff should have such a power, it would be in vain to have justices by commission to inquire of the peace, or to make justices of oyer and terminer (*Ibid.*, fol. 23). It seemed to be considered that the statute only applied to felonies, and to offences felonies at the time the act passed, and did not apply to mayhem, for instance, though it was afterwards made felony (*Ibid.*). The term after the act passed, the judges were assembled in the exchequer chamber to consider the statute, as the terms of the statute were general, that all inquisitions taken before the sheriff should be taken before the justices; and the question was whether in new cases the sheriff could send presentments to the justices, especially offences against the statute of liveries? And all the judges were of opinion that the sheriff had no power to inquire of any new statutable offences, and therefore not of these liveries, and the statute was to be understood of things of which the sheriff had power to inquire either by the common law or by any express statute during such jurisdiction. And it was said that of common nuisances the sheriff had power to inquire of his tourn, and these they should send to the justices (*Year-Book*, 4 *Edw. IV.*, fol. 31). There was a similar decision in the reign of Richard III. that the sheriff could not, in his tourn, inquire of the tanning of leather, nor of such offences as were stated by statute, but only of such offences as were at common law, as nuisances, etc. (1 *Rich. III.*, fol. 1). Thus, therefore, by degrees these ancient institutions, without any violent changes, were left to die out, and become obsolete, as the natural consequence of the changes which time had made in the circumstances and usages of the age. Thus trespass would not lie in a court-baron at common law where force was used (*Year-Book*, 8 *Edw. IV.*, 15), and the sheriff could not inquire in his tourn of any new matter made actionable or punishable by statute, because, at common law, the jurisdiction of the tourn or leet was only such matters as public nuisances (*Bro. Abr.*, *Jurisdiction*, 78; *Year-Book*, 1 *Rich. III.*, 1; *Bro. Abr.*, *Leet*, 25). The tourn or leet shall not inquire of matters given by statute unless it is expressly said that they shall be inquired of at the tourn or leet (*Bro. Abr.*, *Leet*, 25; *Year-Book*, 4 *Edw. IV.*, 3). The tourn, like the leet, the criminal court of the hundred, was strictly limited by prescription, which restrained it from many matters entirely, as those which touched the king's peace; for, by Magna Charta, the sheriff's jurisdiction in pleas of the crown was taken away "Car leete est le plus auncient court en le realme" (*Year-Book*, 7 *Hen. VI.*, 12). Its presentments were ordinarily not traversable, so that a man had no remedy (*Year-Book*, 45 *Edw. III.*, 26), unless he brought it into the king's bench, and there he could be heard (41 *Edw. III.*, 26). Thus it was held that it had only jurisdiction over common nuisances and the like, and not over offences created by statute, unless expressly given to it (*Year-Book*, 4 *Edw. IV.*, 31; 27 *Assize*, 1; 22 *Edw. IV.*, 22). So a particular and private wrong could not be inquired of there, as an assault (*per Martin, J.*, 4 *Hen. VI.*, 10). So of the leet, it was strictly limited by prescription, and hence, as Lord Mansfield observed, was only suited to the manners and usages of ancient times, and gradually became obsolete (*R. Randell, Cowper*).

(a) In the 22d year of the reign there was a case in which it was held that

termination of questions arising upon contracts in fairs, and was generally held by the steward of the manor where the fair was kept. The despatch with which matters were decided in this court, as well as other reasons, tempted many to bring suits here that belonged properly to the common law; to prevent this, it was now ordained, that in such causes the plaintiff or his attorney should swear that the matter arose within the bounds and jurisdiction of the fair, which point might be contested by the defendant.

The statute of Henry VI., and the former acts, which confined sheriffs under great penalties to the exercise of¹ their office for a single year, had been disregarded during the first three or four years of this reign. As this was attributed to the unsettled state of things, which made it convenient to avoid a change, an act was passed² for indemnifying such sheriffs against the penalties. Again, sheriffs were indemnified against the penalty for returning writs after the 6th of November, if they had not received a writ of discharge;³ for the appointment of new sheriffs being on the morrow of All-Souls, they did not receive their patents, nor qualify themselves, till long after Michaelmas term; owing to which, there was, before this act, a chasm during that interval in the office of sheriff. The provisions of this act were enacted more generally in another statute,⁴ which gives the old sheriffs authority to do every act belonging to the office during Michaelmas and Hilary terms, unless they were lawfully discharged.

The playing at certain games was forbid by stat. 17 Edw. IV., c. iv.,⁵ and those who suffered them to be used in their houses or other places, were to be imprisoned for three years, and forfeit twenty pounds. In consideration of the frequent trouble that freeholders were put to in the county of Middlesex, more than in any other county, as they were called upon to attend on juries in the four courts at Westminster, besides the quarter sessions, and the like; and because upon the *venire*, or *habeas corpora*, an

a recovery in the court of Piepowder on a day when the fair was held, on a day on which it was not granted to be held, was *coram non iudice* and void (*Year-Book*, 22 Edw. IV., 7).

¹ *Vide* vol. iii.

² Stat. 8 Edw. IV., c. iv.

³ Stat. 12 Edw. IV., c. i.

⁴ Stat. 22 Edw. IV., c. vi.

⁵ *Vide* vol. iii.

essoins might be cast by the plaintiff or defendant, and then *all* the jurors would be put in default; it was ordained, that in such case the jurors should be demanded at the fourth day of the return, and the appearance of such as were present be recorded.¹

The small space filled by the two kings Edward V. and Richard III. did not pass without leaving some remembrances of it on our juridical polity. The transient reign of the first (*a*) gave no time for calling a parliament, but the proceedings of the courts went on at their stated seasons, uninfluenced by the revolutions that now happened with a rapid succession in political affairs; and there have been handed down cases *de termino Trinitatis, anno prima Edward Quinti*.

His successor summoned a parliament in the first year of his reign, in which several acts were passed; and there are reports of two terms, Michaelmas in the first and Michaelmas in the second year of Richard III. In Richard's parliament some statutes of no small importance were enacted; (*b*) that concerning *cestui que use* had an extensive effect on uses during the next reign, and great part of the succeeding; those about bailing and fines were thought such good regulations that the policy of them was adopted in the next reign, and they were superseded by two improved statutes made for the same purpose. The statute against benevolences might be ranked with the statute *de tallagio non concedendo*, and other securities against levying money without parliament. We shall now consider these acts more particularly. The first three acts of

(*a*) It need hardly be said that this was a merely nominal reign, and that, as Richard III. virtually succeeded his brother, and his reign was so short, and was so entirely similar in character and policy, it may justly be regarded as a continuation of it.

(*b*) Lord Bacon calls this monarch a good law-maker, and speaks highly of the wise and politic laws enacted in his reign (*Life of Hen. VII.*, 2); and though he seeks, as a partisan of the house of Tudor, to deprive the monarch of the credit of those laws, that is not natural as their character, and they were no doubt owing to the great development of legal principles by judicial decisions during the long interval of peace secured by the stern and despotic rule of his predecessor. The Year-Book of Edward IV. is extremely full, and it is in the cases of that reign are to be found the germs of the wise legislation of that of his successor. It is for that reason the two reigns are thus put together in this chapter. The statutes passed in the reign of Richard did but carry out the development of law which took place in the reign of Edward. This is so as to the statutes of uses, at all events.

¹Stat. 8 Edw. IV., c. iii.

this king were, first, for enabling *cestui que use* to dispose of the land; secondly, to relieve the subject from benevolences; thirdly, for letting prisoners to bail.

We have seen the expedients which had already been resorted to for correcting the difficulties that followed from conveying land to use.¹ But the *Cestui que use* to make estates. evil was still felt, and was complained of in the preamble of this act as existing in all its force. It was said, "that no man buying lands, tenements, rents, services, or other hereditaments, nor women who had jointures, or dowers, nor men's last wills to be performed, nor leases for term of life or of years, nor annuities granted for term of life or otherwise, nor persons interested in any of these species of property, could be in safety, because of privy and unknown feoffments;" the meaning of which was, that after a feoffment or gift was made by the apparent owner of the estate, it would turn out that he was only *cestui que use*, and therefore not enabled by law to do any act which could charge the freehold. It was therefore to remedy this now enacted that every feoffment, estate, gift, grant, release, confirmation, and leases of lands, tenements, rents, services, or hereditaments, made by any person of full age and at large, and all recoveries and executions so had or made, should be good and effectual against the feoffor and his heirs, and those claiming any interest to their use. Thus was the *cestui que use* empowered to dispose of the estate, in the same manner as the *feoffee to the use* might at common law (a). It will soon be seen that this new expedient

(a) The author had not rightly apprehended the effect of this statute, which, as was repeatedly explained in the judicial expositions of it in the ensuing reign, was passed, not for the advantage of the *cestui que use*, but for the protection of his grantees, or alienees, or lessees; for it was held that lessees were within the act. Early in the next reign it was held that if *cestui que use* in tail made feoffment in fee, it should bind himself during his life and his feoffees by this statute; and after his death the heir or feoffee could enter in, as it was no more than a grant of his own estate (4 *Hen. VI.*, 18). And in the next year it was held that if *cestui que use* made lease for life, yet the reversion remained in the feoffees, and not in the lessor, for the statute, it was said, was made for the advantage of the lessee or feoffee, and not for the advantage of the *cestui que use* (5 *Hen. VIII.*, fol. 5). And it was held that if *cestui que use* made a statute-merchant, execution could be sued of the land held in use (7 *Hen. VII.*, 6). So it was held that if *cestui que use* made a lease, the reversion was in the feoffees, and not in the *cestui que use*, for that the statute only said that the lease, etc., should be good (8 *Hen. VII.*, fol. 8). It was still recognized law that *cestui que use* only occupied at the will and

¹ *Vide* vol. iii.

to remedy the inconvenience of uses only produced the additional confusion which must naturally follow when two persons had an equal right to dispose of the same land.

The second chapter of this act declares that the *benevolences* heretofore enacted should not be drawn into example, but that exactions of that sort should no longer be levied. These *benevolences* had been introduced by Edward IV., and the abolition of this mode of raising money was an attempt of Richard to conciliate to him the nobility and great men, who were the principal sufferers in these involuntary donations to the crown.

The third chapter of this act complains that persons were daily arrested and imprisoned for felony, sometimes through malice, and sometimes on light suspicion, and so kept without bail or mainprise, to their great vexation and trouble. The old remedy in some of these cases was the writ *de odio et atia*; in others, they had no resource but the discretion of the sheriff, who acted under the authority of stat. Westm. 1.¹ To furnish persons so oppressed with a more speedy and easy redress, it was now provided, that every justice of the peace should have authority by his discretion to let such persons to bail or mainprise, in the same manner as if they had been indicted before the justices at the sessions. Power was also given to the justices to inquire in their session of the escapes of all persons arrested and imprisoned for felony. It was further enacted, that no sheriff, under-sheriff, escheator, bailiff, or other person should seize the goods of one who was arrested or imprisoned for felonies, before conviction or attainder, upon pain of forfeiting, to the person grieved, double the value of the things so taken; which regulation was in confirmation of the law of former times.² The provision made by this

sufferance of the feoffees, and that if he entered and made a feoffment, even after having occupied a long while, that would not purge the tort, but that the feoffees might re-enter (5 *Hen. VII.*, 5). It was indeed afterwards held that if a feoffment was made by *cestui que use* on condition, and the condition was broken, then he could re-enter, and it was doubted whether the feoffees could do so, for it was said, as the statute made the feoffment good, the estate was out of them (21 *Hen. VII.*, 25), and was determined *in perpetuum*. The statute remained in operation until superseded by the statute of uses in the reign of Henry VIII.

¹ *Vide* vol. ii., c. ix.

² *Ibid.*

statute about bailing, was reconsidered in the next reign, when a new act was made.

Another remarkable provision made during the short reign of this king was the statute of fines, which like the preceding served as a model Fines. for another act in the next reign on the same subject. This statute is chap. 7 of Richard III. (a). It refers to the statute *de finibus*; and, to increase the great security and confidence reposed in fines (b), it enacts, that, after the

(a) In one of the latter years of Edward IV. it was held that where a man had been accused before the coroner or justices, but not indicted, and the attorney-general said nothing, he could not be bailed (21 *Edw. IV.*, 25); but he who had been indicted of murder was committed to prison without bail (21 *Edw. IV.*, 70); and it is observed by Brooke, that much must rest on the discretion of the justices, and that the statute of mainprise was an affirmation of the common law (*Bro. Abr., Mainprise*, 78). After this statute it was held that in cases of robbery and murder the accused were not bailable (6 *Hen. VII.*, fol. 1). In the last reign, also, it was said that a person who was of ill fame by credible testimony, he should not be let out on bail (16 *Edw. IV.*, 5). In one of the cases above cited, the last in the reign of Edward IV. on the subject, it was debated with great doubt whether a man could be bailed on appeal of murder (21 *Edw. IV.*, fol. 70).

(b) Fines had been used as records of assurances of title ever since the time of Henry III. (and probably long before), for instances can be shown in the Year-Books of this and the previous reign of fines of that reign. In the reign of Edward III. a fine of the time of Henry III. came before the courts (3 *Edw. III.*, fol. 21), the case of the fines of Newark cited (21 *Edw. IV.*, fol. 61); and in a case in the reign of Edward III. it was said that when a fine was levied by assent of the parties, he who entered by the fine entered on a new right and not of his own original right (8 *Ap.*, p. 1). It has been held, in the latter years of Edward IV., that a fine could be avoided by showing that the parties were not seized of any estate of freehold (15 *Edw. IV.*, fol. 60). There was a curious case in this reign illustrative of that most ancient instrument of conveyance—fines. The Abbot of Merton brought *scire facias* against the Abbot of Bingham, in order to obtain execution of a fine levied so long ago as the reign of Henry III. The defendant pleaded that Bingham Convent was only a cell to the Abbey of St. Alban's, and that the prior, at the time of the fine, was removable, and that neither he nor any of the priors was ever impleaded or impleadable except with the Abbot of St. Alban's. The plea was demurred to, for that it contained an averment as to time of memory, which could not be tried, for it was out of the time of memory since the fine was levied, and if issue was joined upon it, the jurors would have to inquire of a thing before the time of memory, for the limitation (*i. e.*, *Richard I.*) was about the same time. To this, indeed, it was answered, that the limitation did not determine the time of memory, for the ordinance of it was for no other purpose than to fix within what time such writs of possession should be brought, and so prescription should be taken of such time as the memory of man could have converseance of; for if new limitations should be of new limits—as the time of Richard II. or Henry IV.—should the time be understood as time of memory? It was urged, however, that it would be impossible to try a matter which was two hundred years before the time of which memory ran. The plea, however, was held

engrossing, every fine should be openly and solemnly read and proclaimed in court the same term, and the next three terms; during which ceremony all pleas should cease; and then a transcript should be sent from the justices to the justices of assize of the county where the lands lay, who were in like manner to cause it to be proclaimed in every one of their sessions that year; the same of the justices of the peace; which proclamations were to be certified the second return of the following term. After these proclamations and certificates, such fine was to conclude as well privies as strangers, except women covert not parties to the fine, persons within age, in prison, out of the realm, or not of whole memory; with a saving of the claims of all others having a title at the time of the fine being levied, so as they prosecuted their claim, by action or entry, in five years after the proclamation and certificate; and also saving the rights of those upon whom a title descended after the fine, provided they pursued their right in five years after such title came to them; or, if the persons were under any disabilities or defects, within five years after the removal thereof. The statute has a clause enabling persons to levy fines according to this act, or at the common law.

The other acts of this reign that are at all of a juridical nature are the following: one was to declare that wherever the king was co-feoffee of lands to the use of the feoffor, the land should be in the co-feoffees; which was to prevent the conclusion of law that would give, in such

bad, on the ground that it did not lie in the mouth of the prior to deny a fine executed by his predecessor in the name of the prior and convent (*Year-Book*, 2 *Rich. III.*, fol. 10). Thus a fine was executed as ancient as the reign of Henry III.; and it may be conceived that this case would bring very forcibly before the minds of the lawyers and legislators of the age the importance of upholding these ancient assurances. No doubt that case also impressed them with the importance of providing for the publicity and notoriety of fines, in which lay the real substance of the proceeding. For it was by means of this publicity and notoriety that notice was secured to parties interested. This notice was secured, it should seem, in cases of recoveries, by the practice of the courts, which required public proclamations in the courts where the land lay (*Zouch v. Stowell*, *Plowden's Reports*); and hence the provision in the present statute for similar proclamations in the case of fines; that is, proclamations not only in court, but in the county where the land lay. The object of the statute was twofold: to secure the publicity of fines, and, on account of such publicity, to give them efficacy and finality. Lord Bacon describes the reason and policy of the measure, by remarking that statutes which quiet possessions are fit for time of peace.

case, the whole to the king;¹ another required a certain qualification of property in jurors who served in the sheriff's tourn.² The remaining acts related principally to trade and commerce.

The distinction between *private acts* (whose origin we have considered in the preceding period)³ and *public*, was first made in the reign of Richard III., who applied this new invention to the purpose of destroying his enemies by parliamentary attainders. All Richard's statutes are in English; and so they continued to be drawn in all subsequent periods. When the parliament of Richard is considered in all these lights, it becomes an object of some note in juridical history.

The decisions of courts during these reigns present many interesting points of historical investigation. Among other subjects of improvement we see that system of equity which is administered in the court of chancery — we find the doctrine of uses and the application of a common recovery to the barring of estates-tail fully established. These were topics unknown to our old law (*a*). In the meantime the learning of real actions gradually gave way, personal suits became more frequent, and pleading grew into a science of much nicety and refinement; in short, the whole force of the law seems to be assuming that character which it has retained to the present day.

The statute *de donis* still operated with great force on landed property, and it was thought expedient to contrive some method of a general nature, which, to a certain extent, should have the effect of a repeal. In the course of the long contention for power between the houses of York and Lancaster, some temporary motives might contribute to promote such an attempt. An impoverished gentry, and a nobility exhausted by the expenses of the field, were eager to obtain a power of exchanging the slow produce of their inheritances for the common medium, which was current everywhere, and which could now only be procured from a commons daily increasing in riches by the cultivation of foreign and domestic trade. Nor was this the only motive for making alienations of

(a) This, it will be seen, except in a very modified form, is erroneous. All these things were well established in the older law.

¹ Ch. 5.

² Ch. 4.

³ *Vide* vol. iii.

land. To persons of unembarrassed circumstances, to whom money afforded no temptation, a full dominion over their own property, if not a desire to alien, was extremely grateful. These were as much inclined as the former to avail themselves of any legal means of enlarging their dominion. To such, the possession of a clear fee-simple was far preferable to land when under the tie and incumbrance of an entail. The owner might then satisfy his caprice in the full management and disposal of it, regardless how it lay open to the penalties and forfeitures which the law might enforce on property not entailed. The wishes of all were at length gratified in the reign of Edward IV., and we shall now consider the steps which led to this important event.

Among all the cases about recovery by default, there is no opinion either one way or the other on a recovery by default of the vouchee (a); but it should seem from the

(a) The nature and effect of a recovery can only be rightly understood by bearing in mind that it was a recovery by judgment in a real action, pursued in the same form as when "suffered" for the purpose of conveyance or when obtained adversely. The real action must be brought against a tenant of the freehold, "tenant to the *præcipe*," as he was called from the term of the writ, *præcipe quod reddat*, which, being action of the freehold, required to be against the tenant of the freehold. But he might be only tenant for a particular estate or freehold, or for life, or in tail; and in such case it was necessary for the tenant to "vouch" the party entitled to the reversion in fee, that he might come forward and defend his title; and there were provisions in the statutes of Westminster to provide for this, and, on the other hand, to enable the demandant to "counter-plead" a false voucher, that is, of a party having no real title. But if *præcipe quod reddat* was brought against a tenant for life, who vouched a stranger, and the demandant counter-pleaded the voucher, and it was found for the demandant, he in the reversion had no remedy but writ of right; for if he who was vouched lost, either by trial or by default, he in the reversion had no remedy; and so if the tenant vouched a stranger who lost, then he in the reversion had no remedy (*Year-Book*, 5 *Edw. IV.*, fol. 2). This had been laid down, not as new law, but settled and understood law, in the early part of this reign; and it had always been law, and could not but be law, so long as real actions continued subject to the recovery being falsified in a writ of right by proof that the recoverer was not tenant of the freehold, that is, had no estate of freehold. Nor can there be the least doubt that during all this time they were used to bar estates-tail. The statute *de donis* in the reign of Edward I. alludes to some mode of alienation which barred the issue (for it says the land "ought to remain to the issue"); and there was no other mode in which it could be done but by a recovery, which purported on the record to be a recovery in a real action, and which could not be presumed to be fictitious. Whether or not it could be falsified by the issue on the ground of fraud to which the recoverer was party, is another point; but, *prima facie*, a recovery would bar the issue, as privies in estate. And, as will be seen, no one had ever ventured to question the apparent validity of such recoveries. In the celebrated case of *Taltarum*, noticed by

famous case of *Taltarum*, that no doubt was entertained about the effect of such a recovery to bar an entail. It seems that it had long been the practice to suffer recoveries in that way for that very purpose, and that the decision, or rather opinion, then delivered, was nothing new.

The famous case of *Taltarum* is in 12 Edw. IV., and has always been considered as closing the question as to recovery; not that the court there directly decided the point, but that while they determined in that case against such a recovery improperly suffered, they seemed to admit that a like recovery forcibly suffered would bar the issue in tail. The case was this: In a writ of entry on statute

the author a little further on, this plainly appears; and the notion that the use of recoveries to bar entails *then* first arose, is one of the erroneous traditions of legal history. It has commonly been represented that the practice of barring estates-tail by recoveries arose or was established by this case. Nothing can be more erroneous, and it is an instance of a very common fallacy which must be guarded against in the study of legal history, viz., the supposing that a practice or a doctrine of law has first arisen at the time it was first recognized by legal decision. Quite the contrary is usually the case, and was so in the present instance. Recoveries had, it is plain from former statutes (for instance, the statute of Gloucester, *temp.* Edward I.), been long used, and, no doubt, used to bar estates-tail. As they had been used to defeat feudal rights, no doubt they would be used to defeat entails. The case of the recoveree could set up that the party was not tenant at the time of the proceeding, and that therefore it was null and void in law; for the heir claimed, not as heir of the recoveree, but by the gift in tail; and if a man (it was said) sets up against me a recovery had against my father by confession, I may say that at the time my father was not tenant of the land, but that I myself was so (*i. e.*, tenant of the freehold), because I do not claim through my father, but by myself. And if after recovery against a tenant in tail, and before execution, the tenant died, his heir could "falsify the recovery," and would be in by descent. And, therefore, if the recoveree was not tenant, the recovery would be void, for there was no one against whom the recovery could be had (*Year-Book*, 12 Edw. IV., fol. 15). The effect of a recovery, that is, a recovery against a tenant of the freehold, was that, according to a well-established rule of law, it bound the parties and his privies, *i. e.*, the recoveree and his heirs. But a recovery against a stranger, though it was a title, was not an estoppel (12 Edw. IV., 16); and any one not privy in blood or estate to the recoveree was a stranger. And as a stranger to a fine could defeat it, so could a stranger to a recovery in a similar manner, namely, by showing that the parties had no estate of freehold at the time of the recovery or fine (12 Edw. IV., 15; 21 Edw. IV., 21), and this could be set up by the issue in tail (*Ibid.*). The party entitled in reversion could, on a similar principle, "falsify a recovery" at common law, and was aided in doing so by several statutes (9 Edw. IV., 37). Numerous cases on that subject were decided throughout this reign (7 Edw. IV., 19). The party entitled in remainder could falsify the recovery (12 Edw. IV., 21), and issue in tail could falsify a recovery (13 Edw. IV., fol. 3). That is, in a real action.

5 Rich. II., the defendant conveyed to him a title under an entail. The plaintiff replied, that one Taltarum had before brought a writ of entry against an ancestor of the defendant—that the parties appeared—that Taltarum counted of his own possession—that the tenant made defence, and vouched to warranty one King, who was ready, and entered into warranty—that the issue was joined on the right—that the vouchee made default, upon which the demandant had final judgment against the tenant in tail; by force of which Taltarum entered and enfeoffed the plaintiff. The defendant rejoined, that before the recovery by Taltarum,¹ the tenant in tail had enfeoffed another, who had re-enfeoffed him in tail.

Upon these pleadings the following question arose: Whether the defendant, who claimed under the first entail, was barred by a recovery suffered by his ancestor at the time he was seized of a later entail, created since? This was the point before the court. In debating the matter, it seemed to be agreed by the whole court, that a recovery by default of the vouchee was a bar to the issue in tail; and it seems as if they rested the reason of its being a bar entirely upon the recovery in value against the vouchee. Further, it was said by one of the judges, that an entail cannot be destroyed by a recovery in value, unless that which is recovered go in the place of the other, and that cannot be unless the recovery in value be against the *donor*; in which case it was a settled point if *A.* give land to *B.* in tail, and he recover in value against *A.*, that the issue of *B.* shall have a formedon of the land so recovered. Consistently with this, as the recompense goes to that issue only who loses the estate, the defendant, in the case in question, who claimed under an entail of which the tenant was *not seized* at the time of the recovery, could be entitled to no recompense in value, and therefore would not be barred by the recovery.

Thus did the court, in debating the effect of a bar by a recovery, confine itself to the strictest technical reasoning. Upon the principle which had been admitted in *Octavian Lumbard's* case (*a*), and recognized in some others, but in the reign of Edward III., and since, they considered a

(a) Nothing of the sort was established in that case, which was merely a case of exchange of lands.

¹ 12 Edw. IV., 15, 19, 20, 21.

recompense to the issue as a sufficient reason for depriving him of his estate; and a recompense in value to the recoveree being part of the judgment in a recovery on a *præcipe*, this proceeding was, in its very frame, happily adapted to the purpose. A recovery seems to have forced itself upon the courts, who recognized its effects no further than they were obliged by the legal circumstances attending it. Their decision in this case (*a*) was entirely conformable to the exact requisite of the proceeding, for they expected, as was before observed, that the vouchee should

(*a*) The author has misunderstood the case; there was not and could not be a discussion on the question; the nature of the action precluded it, and that was the very point determined. It was an action for forcible entry, in which the defendant had to show a right to make such entry; and he sought to do so by setting up that he was heir in tail. To which the plaintiff replied the recovery by Taltarum against another alleged to have been issue in tail. To this the defendant rejoined a feoffment in fee by that issue in tail, and a re-enfeoffment of heir in tail by the feoffee, with remainder to his right heir; and alleged that the recovery against him was, after possibility of issue, extinct, and that he remained seized after the recovery, and died seized; and that, after this, the defendant had entered as heir in tail. And the point was, whether the entry was "congeable," or whether he was put to his formedon; and the court held that it was *not* "congeable," and that he was put to his formedon, as it would have been, they said, in the case of a fine levied by the tenant in tail, in which case the heir could only sue in formedon. For when the judgment was given against the tenant in tail, it would bind the issue as to the possession, so that the entry of the recoveror would be congeable upon him; although, if the recoveror should sue *scire facias* on the judgment against the issue, the issue could falsify the recovery; but if the recoveror entered, the issue could not enter upon him. And if judgment was recovered against the tenant for life, and, before execution, he died, the entry of the recoveror upon the reversioner would be congeable, and the recoveror could not enter upon him, but was put to his writ of entry *ad communem legem*, and in that he might falsify the recovery; and so here, for in this judgment the entry upon the issue was congeable, and he should be put to his formedon. So Choke said that if a recovery should lie against the tenant in tail by action tried, the recovery should bind the heir, so that he could not falsify it in the same point. And if the recovery was by default, and the tenant in tail died before execution, and the right descended to the heir (in tail), yet the entry of the recoveror upon him should be congeable, for the possession was so bound that it was executory against the issue, and nothing remained to the issue but the right by formedon, for the recovery defeated the possession of the tenant in tail. And the other judges, except Littleton, appear to have taken the same view — that the issue in tail could not falsify the recovery *in such an action*, *i. e.*, an action personal and possessory — for his father was bound by the judgment; and if the heir would have any remedy to falsify the recovery, it would be in formedon (12 *Edw. IV.*, fol. 21). Thus, therefore, the decision was not that the issue was barred, but that his entry was not legal, and that he was put to his writ of formedon — the regular remedy of issue in tail. It is impossible therefore that this decision could have had any great effect as to the validity of such a recovery, for nothing about it was determined at all.

be the donor, who had actually engaged to warrant upon the original gift of the land.

Such were the grounds upon which a recovery was explained and supported, when it was supposed, or at least, pretended, to be a real proceeding. In after-times, when it was considered merely as a fiction for the purpose of barring estates-tail, the same language was adhered to as the best way of reconciling it to reason and to law. But without recourse to these technical arguments, the application of a recovery to the purpose of barring entails may be defended on other grounds equally consistent and legal. Why should it not be at once said that the recoveror recovers the land by better title? A fiction surely as fair as that of a recovery in value to the issue. As this is the plain sense of it when the *præcipe* is brought against a tenant in fee, why should it not, and why should it not be so avowed when brought against a tenant in fee-tail?

It should seem that a slight consideration of the statute¹ *de donis* will render such an apology as the inference drawn from a recovery in value perfectly unnecessary. It was intended by that act to bind up the hands of the tenant in tail from prejudicing his issue, but not to preclude third persons from pursuing their lawful claims against the land entailed. It could not be said, as in opposition to *their right*, that the will of the donor should be observed. That statute provides only against *voluntary* alienations, and, among others, declares, that a fine levied of such entailed land shall be void; a fine being at that time an amicable suit for the single purpose of transferring the possession and right of land. But to all involuntary alienations, to all recoveries by right, such land entailed was still liable, notwithstanding the strict restraint on alienation by the owner. A *præcipe* was then an adversary suit; and though the churchmen had about that time converted it to its present use, even then, if a recovery was had thereon, it carried with it the pretence of a recovery by lawful title, and bound only as such. When such proceeding grew more general, it still bore its original import; and under all considerations of it, with regard to the recoveror, recoveree, and the thing recovered, will bear no other comment or conclusion, but that the re-

¹ *Vide* vol. ii.

covery was had by lawful right, regularly decided upon. The statute *de donis* had not taken away such a mode of alienation; and, of course, an estate-tail, in its very origin, was liable to be barred by a recovery in a judicial proceeding as well as by a collateral warranty. The lord chief-justice Choke, in the case above mentioned, seems to consider it in that light; and when that judge had been spoken of in later times as the author of a new device for barring entails, he is very justly vindicated by the great commentator on Littleton, who says, "it was upon former authorities and opinions of judges, discovered by him, and assented to by the rest of the judges."¹

Whatever may be the true reasons upon which this point of law is to be explained, it is certain that this solemn declaration of it by the judges had a more extensive influence than almost anything that ever came from the courts of Westminster, respecting private rights. It made an epocha in the history of landed property. It had the effect, in a great measure, of repealing the statute *de donis*; for after this, every tenant in tail had a power of barring his issue, and those behind in remainder; not by compensating them with a real equivalent, as was required upon the principle of *Octavian Lumbard's* case, but by the supposed and ideal recompense of a recovery in value against the vouchee. The statute had thenceforward no other force than to enable persons to make entails, with long substitutions of remainders, which could not have been created at common law, and which every tenant, as he came into possession, had the power of destroying by suffering a recovery—a power which was most commonly exercised as soon² as the party was of years to do a legal act.

The reader has been before reminded that a recovery on a *præcipe* had continued to be a mode of conveyance, and the decision in *Taltarum's* case, as it gave additional effect to this proceeding, contributed to make it more generally useful. A recovery thenceforward became established as a common assurance of estates, and began to partake of that high credit and authority which had long been attributed to a fine.

A person who was seized of a clear fee-simple might con-

¹ 1 Inst., 361 b.

² Black., vol. ii.

vey his estate by a recovery; and by later opinions, confirmed by *Taltarum's* case, the same may be said of a tenant in tail. What persons, by reason of the narrowness of their estate, could not convey by recovery; what circumstances were necessary towards making the recovery complete and effectual; and how a recovery suffered by such persons, or without such circumstances, might be avoided, is an inquiry that will best discover the nature of a recovery as a conveyance.

A feigned recovery, like all other judgments, might be examined in a writ of error or attain. But the more common way was to *falsify the recovery* (as it was called) by another action, sometimes grounded on an entry and sometimes not, as the case might be, or by a plea to any action founded upon the recovery. Thus, if the claimant's entry was not taken away by the recovery, he might bring an assize; and when the recovery was pleaded against him, he might reply such matter as would avoid the recovery: the same if his entry was taken away, and he brought a *præcipe*, and the recovery was pleaded. Some special actions were given in certain cases; as a *quòd ei deforceat*, for a particular tenant, deceit for want of summons, and some others. Another way of falsifying was by plea; as where an action was founded upon a recovery, and the tenant pleaded matter to avoid the recovery.

The grounds upon which a recovery might be falsified were various. Thus, if a recovery was pleaded, it might be replied, that at the time of the writ brought the tenant was not tenant of the freehold, nor at any time since.¹ This plea of no tenant to the *præcipe* was the most common.²

We have already taken notice of the origin of uses, in speaking of the several statutes that were passed for correcting the inconveniences suffered for this new species of property. Notwithstanding the distance of time since these statutes were passed, it is pretty certain that uses were not carried to any great extent (a) till then, and dissensions between the houses of

(a) It was often said by the judges, that uses were at common law, though they were not common until the statute of *quia emptores*, which implies that they became common then (*Brooke's Abridgment, Feoffment al uses*). Lord

¹ 12 Edw. IV., 14, 19; and 13 Edw. IV., 1.

² *Vide* vol. iii., c. xxi.

York and Lancaster made it necessary to find out some method of conveying and concealing real property from the reach of debts and forfeiture (*a*). The attainders which then threatened the nobility made them resort to uses as the most convenient method of sheltering their lands from the consequences of both.

In the 4th year of Edward IV.¹ this kind of property is thus spoken of in the very language and terms which have ever since been applied to it: *A. enfeoffs B. to the use of A.*; here *B.* is seized of the land to the use of *A.*, who only enfeoffed him upon trust and confidence: upon which several rights the court thus explains itself: "In the chancery, a man shall have his remedy according to the intent of the feoffment, and according to conscience; but in the common pleas, and in the king's bench, according to the course of common law it is otherwise; for the feoffee shall have the land, and the feoffor shall have nothing against his own feoffment, though it was only upon confidence."

It appears from hence, that the judges had qualified their notions concerning this new subject of property, since the beginning of the reign of Henry VI., when the strict opinion before mentioned was delivered. Uses had now been very well considered, and their properties and incidents recognized. So completely was a *use* considered as separated from the land, that in this same year² it was declared, that a feoffment without any intent expressed, or if expressed to be to the feoffor and his heirs,

Coke says quaintly, that uses arose in times of force from fear, and in times of peace from fraud (*Chudleigh's case*, 4 *Coke's Rep.*). Lord Holt, in a case reported by Lord Raymond, expressed an opinion similar to our author's, that uses became more common during the wars of the Roses, in order to prevent forfeitures.

(*a*) Uses were enforced in equity, and thus the practice of uses gave rise to the development of equitable jurisdiction. A use, in fact, was a trust or confidence, and trusts have always formed a large and important part of the jurisdiction of equity. The cases on the subject in this reign are numerous. Thus a *cestui que use* for husband and wife sold the land, and the wife received the money, and the feoffee made feoffment to the vendee at their request; the husband died, and the wife brought subpoena against the feoffee, and he was committed to prison (7 *Edw. IV.*, fol. 14); but it would not lie against the feoffee to a use (4 *Edw. IV.*, fol. 8). So subpoena against conusee of a statute-staple to a use, who releases (11 *Edw. IV.*, fol. 9). So subpoena lay by *cestui que use* of an obligation against the obligee, to compel him to sue (2 *Edw. IV.*, fol. 2).

¹ 4 *Edw. IV.*, 8.

² *Ibid.*

should always be construed as made to the use of the feoffor's will, and that he might alter it whenever he pleased; except where it was declared to the use of a stranger, or the intent was to take back an estate-tail; for in these cases the interest of a third person was concerned, and it would not have been consistent with conscience to defeat it by any subsequent alteration.

In many respects the properties of a use were settled in analogy to the law respecting land. It was Their nature and properties. to descend as the land would: thus it went to the younger son in borough-English. If one seized *ex parte maternâ*, or seized in tail, with remainder over, enfeoffed one to a use, the use descended as the land would have done; but it was not so of land held in right of the wife.¹ There was a *possessio fratris* of a use.² But where the *cestui que use* was attainted, and died without a will, the lord was not entitled to the use, nor was the heir; and it was thought it should belong to the feoffees.³ The conclusions of the common law for a long time lay so strongly in favor of the legal owner, that if the feoffee died seized, his heir became absolute owner of the land, discharged of the use; and this opinion prevailed till 14 Edw. IV., when the heir was held liable to a subpœna.⁴

The conscientious discharge of the trust reposed in the feoffee was so regarded, that any stranger who became seized of lands by feoffment of the feoffees with notice of the use, was answerable to the *cestui que use*.⁵ A woman being *cestui que use* became covert, and was not allowed to command her feoffee to make an estate; for he by so doing, it was said, would be guilty of a breach of trust, and be committed to prison by the chancellor;⁶ and, under the like penalty, the feoffee was bound to maintain all suits incident to the freehold.⁷ Uses were thus established as a species of property distinct from the land out of which they issued; the land and the use were two independent subjects, and might reside in different persons. A gift of land by fine or feoffment, without something more, did not now, as formerly, convey any interest in the land; the use accrued only by the express appointment of the feoffor, or upon some equitable right to it.

¹ 5 Edw. IV., 7 b.

² Ibid., 7.

³ Bro., Feoff. al Uses, 34.

⁴ Fitz., Subp. 14.

⁵ 5 Edw. IV., 7 b.

⁶ 7 Edw. IV., 14 b.

⁷ Ibid., 29 b.

This is the height to which uses had grown in the period of which we are now treating; their consequences were carried much further in the reigns of Henry VII. and Henry VIII.; already they had raised much jealousy in the courts of common law and in the legislature. They were at first treated as little better than pretences to cover fraud, and were at length admitted rather as abuses which had obtained a legal form by sufferance; and in that light the parliament at different times endeavored to correct and restrain their irregularities, without attempting entirely to eradicate them.

Indeed, uses were pregnant with great inconveniences. The possession of land by *A.* to the use of *B.* was a concurrence of rights that could not fail of producing confusion. *A.*, the *terre-tenant*, as the lawyers called him, was possessed of the land by the forms of law, and so was its legal owner; but a confidence was reposed in him by the giver of the estate, that he should hold it to the use of *B.*, for this reason called the *cestui que use*. Thus *B.* received the profits; was in conscience and equity the owner; he enjoyed a credit and importance in the world by expending its produce, though the land was not liable to the engagements which he was enabled to contract by means of that credit and importance. Thus a kind of deceit was practised on mankind. To remedy this, occasional expedients were applied, which were of some benefit in particular cases; while the disease, still vigorous, pervaded every part of the law of real property. The plan upon which these expedients were conceived was, to put the *cestui que use* into the same condition as if he was seized of the actual freehold by the solemnities of law. Such regulations, from the subject of them, were called the *statutes of pernors of profits*, and have been already mentioned in their¹ proper places.

In the court of chancery the following points were determined. A man was bound in an obligation to *B.*, for the use of *C.* It was held that in this case *C.* should have subpœna against the obligor.² One coparcener would not count according to the truth, and in the same manner as the other coparcener had done; and there it was held that a subpœna lay.³ Where a person had made another the

¹ *Vide* vol. iii.

² 2 Edw. IV., 2.

³ 6 Edw. IV., 10.

procurer of his benefice, and had faithfully promised him¹ that he would save him harmless from the consequences of holding it; when he afterwards resigned it, and was vexed on account of the part he had acted, it was agreed that a subpoena lay for such indemnification; and it was there said, If I promise to build you a house, and do not perform my promise, you have your remedy by subpoena.² It was a doubt at this time whether a subpoena would lie against an executor or heir; and it seems after much debate agreed, that it would not lie against the heir of the feoffee; but he might hold the land discharged of the use, and the *cestui que use* was driven to seek redress in parliament.³ Yet where a man had made a fraudulent gift of his goods to avoid his creditors, and the person to whom they were given died, and they came to the hands of his wife, there, when a bill was filed against her, she was compelled to answer it.⁴ And before that, the following case was decided: Worsley, a baron of the exchequer, and one Middleton, bought some wool of Sir H. Wych, for which they bound themselves in several obligations. Middleton had all the profits of the merchandise. Sir H. died, and made his lady his executrix; and by his will gave a longer day to Middleton. Upon this, Worsley brought his bill against the executrix, to discover what was owing, and to account. The bill was held good; and it was agreed that a bill might be brought to make a person discover his testator's will, and the trust there declared.⁵

A man was surety for one, who joined with others in a bond to save the surety harmless; afterwards the surety paid the money, and sued upon the indemnity bond; in the meantime, the first debtor brought his bill in chancery, and set forth, that before the bond was given to indemnify, he delivered certain goods to the surety, as a security for the same eventual burden on him; and therefore he now prayed restitution of them, that he might not be doubly charged; and also he prayed an injunction: the latter prayer was denied, upon the defendant in equity claiming a property in the goods.⁶ The cognizor in a statute-merchant had paid the money, without a release; and the cognizee, notwithstanding this, sued

¹ *Promitto per fidem.*

² 8 Edw. IV., 4 b; *Vide* vol. iii.

³ 8 Edw. IV., 6.

⁴ 16 Edw. IV., 9 b.

⁵ 9 Edw. IV., 41.

⁶ 16 Edw. IV., 9.

him at law: a bill being brought in chancery, it was a question whether he should have relief. The chancellor had great doubt, and called in the assistance of the judges in the exchequer chamber; where, after much argument, the chancellor was convinced that, in the instance of a statute-merchant, which is a matter of record, as the party need not have paid the money without a release, it would not be consistent with the rules of law to relieve; but as to obligations, which are matters *in pais*, that question was left open to consideration.¹

The style of pleading in equity was of a more liberal cast than that in the other courts. It was held that a person should not be prejudiced for mispleading, nor want of form; but if he proved such matter as served to aid him *in conscience and equity*, it was sufficient. The authority of this court was, as they expressed it, *secundum potestatem absolutam*; while at common law they were said to proceed *secundum potestatem ordinatam* (a).²

Such were the advances made by the court of equity

(a) This reign is distinguished, if not by the rise, at all events by the rapid growth, of the equitable jurisdiction of the court of chancery, and its recognition even in the courts of law. And it has also been seen that the practice of uses led to the development of equitable jurisdiction. Very early in the reign, in an action of trespass, in which the defendant justified as *cestui que use* on a feoffment to the plaintiff to his use, the court said: "It is good matter to be shown in the chancery, for the defendant there shall have the intent and purpose of the feoffment, for by conscience in the chancery a man shall have a remedy to the intent of a feoffment. But here, by the course of the common law, it is otherwise, for the feoffee has the land, and the feoffor against his own feoffment cannot justify whether the feoffment was upon confidence or not" (*Moile, J., 4 Edw. IV., fol. 8*). The counsel for the defendant urged that the law of chancery was the common law of the land, and that as he would have the advantage of the equity there, so he ought to have it equally here; but *Moile, J.*, said: "It cannot be so here in this court, as I have already said, for the common law of the land varies in this case from the law of chancery" (*Year-Book, 4 Edw. IV., fol. 9*). Here it is obvious that the principles of the common law were regarded as including equity; and though it was deemed not within the jurisdiction of the courts of common law, yet the courts of common law recognized equity, while regarding it as within the jurisdiction of chancery. It was laid down in another case, that if matters of conscience arose, the chancellor could not judge according to conscience (*i. e.*, according to his own arbitrary ideas of it), but according to the common law (*8 Edw. IV., fol. 5*), which would be true in the sense of the modern maxim, that equity follows law, *i. e.*, *follows it out*, for that perhaps is the best definition of equity. A suit in equity could be maintained against feoffees in trust to compel them to convey to the *cestui que use* (*16 Edw. IV., fol. 4*). And so again if a man, to defraud his creditors, conveyed away his goods, retaining possession (*16 Edw. IV., fol. 9*).

¹ 22 Edw. IV., 6.

² 9 Edw. IV., 15.

towards relieving suitors against the rigor of the common law. Its jurisdiction did not comprehend a great extent; and the exercise of it was feeble and imperfect. The chancellor seldom had a point of difficulty before him but he called in the advice of some of the judges, or adjourned it into the exchequer chamber, where it was discussed and resolved according to the opinion of the sages of the common law. This had the effect of settling on the solid foundation of the law of the land this new jurisdiction, which all the while grew up under the guidance and encouragement of the courts of common law (*a*). Owing

(*a*) It was laid down that where a man had remedy by the common law he should not have remedy in chancery (18 *Edw. IV.*, 13). There a subpoena was sued by one Hampden against B. and C., apparently on an equity to hold to his use; and they showed that he whom the plaintiff supposed to be their feoffor had issue, and died, by which the inheritance descended to the issue, who came in and showed the descent to him to his feoffment of B. and C., who were examined, and stated that he had enfeoffed them, but had not given them livery of seisin. And it was moved, whether the heir should have judgment to recover the land, or if the plaintiff should have damages? and Morton, master of the rolls, (no doubt he who was chancellor under Henry VII.), said that he could not give judgment of the land, for it appeared that the feoffees had nothing by the feoffment, and the heir could have his remedy by the common law, which was conceded; and so the plaintiff had his damages (18 *Edw. IV.*, 13). And it was laid down that the chancellor had two powers, one as judge temporal, by attachment, etc., and as judge of conscience by subpoena; and if it appeared in the matters temporal that a question of conscience arose, he should judge according to conscience only; accordingly the chancellor and all the judges seemed to concede this, and they said it must be by bill (8 *Edw. IV.*, 6). Cases in equity are to be found in the Year-Books of this reign, under the head "conscience" or "subpœna." Thus where it was found in a statute-staple to J. and H., for the use of J., and H. released to P., and upon that J. sued a subpœna (*i. e.*, in chancery), and set forth the matter to show that H. released in fraud of J., and P. was discharged of the suit; but it stood against H., for he had deceived J., etc., (11 *Edw. IV.*, fol. 8). And it was said, If my feoffee in trust enfeoff another, who knows well that the feoffor had nothing except to my use, subpœna (*i. e.*, in equity) lies. And in the case in question, if P. had paid the money to H., he might have released with good conscience. In that case it appeared that H. and J. had sued out execution against N., and taken him, and then there was an *additâ geolâ* for his discharge; and the matter was argued in the court of law in the presence of the master of the rolls (*Ibid.*), who desired to go according to equity, but the judges said they were bound to go according to the course of the common law (*Ibid.*). It has already been seen, in the Introduction, that the civil law, which was the perfection of reason, contained in it the elements of equity as well as law, and that the canon law, as our author elsewhere observes, was based upon it, and embodied its principles, merely modified by those of the canon law. And as the chancellors during this period were ecclesiastics and canonists, and the common lawyers originally were so, it is easy to understand how equity arose. There were not wanting men, even among the common law judges, who understood its fundamental principle—the law of natural justice and reason. Thus, in the

to this state of pupillage in which the court of equity was kept by the courts of common law, and the unfavorable comparison it suffered when opposed to the ancient judicatures of the realm, it appeared rather as tolerated in certain instances, than acknowledged as a part of the judicial establishment of the kingdom.

The following fact is a strong instance of the imbecility of this court. In the 22d year of Edward IV.¹ after a verdict, an injunction had been obtained, which hung up the cause for some time. Hussey, chief-justice, asked the counsel for the plaintiff if they would pray judgment according to the verdict; but they declared their apprehensions about infringing the injunction. To this one of the judges said, that though the injunction was against the plaintiff, yet his attorney might pray judgment with safety; and so *vice versa*. Hussey said that they had talked over the matter among themselves, and they saw no mischief which would ensue to the party, if he prayed judgment; for as to the penalty of the injunction, they were convinced *it was not leviable by law*; and then there remained nothing but imprisonment: and as to that, the chief-justice said, "If the chancellor commits any one to the Fleet, apply to us for a *habeas corpus*, and upon the return of it we will discharge the party; and we will do everything to assist you." It is true one of the justices said he would go to the chancellor, and ask him to dissolve the injunction; but this probably was suggested out of tenderness to the chancellor's situation; for they agreed in declaring, that they would give judgment if the party would pray it, notwithstanding the chancellor continued the injunction;

course of this reign, it was said by a great lawyer (Yelverton), afterwards chief-justice, that "it was desirable to do as the canonists and civilians do when a new case arises, of which they had no law before; then they resort to the law of nature, *which is the ground of all laws*, and according to that which they consider to be most beneficial to the common weal they hold, and so must we. 'If we had a positive law upon the point, we must follow it; and, if not, then that which is most necessary to the common weal; and, according to that, make our law'" (8 *Edw. IV.*, fol. 13). As equity was based upon natural justice or conscience, as it was usually called, and the chancellors were in these times ecclesiastics, who naturally judged according to the canon law, the affinity between the civil or canon law and equity in this its earliest stage, is obvious. It had not escaped our author, and the cases on the subjects in the Year-Books, where are to be found the germs of all our law and equity, amply confirm his views of the subject.

¹ 22 *Edw. IV.*, 37.

but they said, they would not give damages for the loss occasioned by the proceedings in chancery.

It seems that the chancellor, besides the assistance of the masters in chancery, who properly composed his council, and were his ordinary assistants to sit with him, and gave their opinion when asked, used also to associate to him sometimes peers and bishops, but more commonly some of the judges. In consequence of this, the decrees ran, *Per curiam cancellariæ, et omnes justitiosarios*: sometimes, *Per decretum cancellarii ex assensu omnium justitiosariorum, et aliorum de concilio regis præsentium*. Again, *Ideo consideratum est per curiam de assensu Johannis Fortescue, capitalis justitiosarii domini regis ad placita tenenda, et diversorum aliorum justitiosariorum et servientium ad legem in curiâ præsentium*. Thus the form varied as often as the person or persons by whose assent the judgment or decree was made.¹ From this we see, that the chancery still preserved some traces of its constitution in the time of Edward III.,² when references used to be made to the chancellor, treasurer, and others of the king's council in chancery. This was the state in which the authority of the court of equity in chancery stood at this period.

Bargains about matrimony were very common, and many such actions appear in the books from the reign of Edward III. down to the time of which we are now writing. A distinction had been made, where the word *marry* or *marriage* was or was not used in the agreement;³ and the courts held, that the term *marry* or *marriage* had the effect of making it wholly a *spiritual* matter, so that an action ought not to lie for it in the temporal courts; but that otherwise an action would lie. We find no notice of such distinction now; but it was held *per totam curiam*, in the reign of Edward IV., that debt would not lie for *marriage-money*, because the defendant had not, *quid pro quo*, and it belonged to the spiritual court.⁴ Yet a few years after, when this opinion was maintained by the master of the rolls, and by Choke, Littleton, and Townsend, the contrary was held by Rogers and Sulyard.⁵ So difficult was it to adjust a point of law that had once been agitated with different success.

¹ *Hist. Chanc.*, 80.

² *Vide* vol. iii.

³ *Vide* vol. iii.

⁴ 14 Edw. IV., 6; 15 Edw. IV., 32.

⁵ 17 Edw. IV., 4.

A contract could not be perfect without the agreement of both parties. Thus if a person cheapened wares in a market, and the tradesman named the price, this was no bargain, so as to enable the buyer to take the goods unless he paid the money, or a day of payment was fixed.¹ If therefore such a person had gone away without paying, and had brought the money the next day, the seller would not have been obliged to accept it.² When the bargain was completed by agreement, the vendor was entitled to the price in all events, whatsoever happened to the thing sold. Thus, as was before seen, though the right owner should retake his property from a vendee, the vendor might still have an action of debt for the price.³ Again, where a man seized of land *in jure uxoris*, sold four hundred oaks for £20, and half were taken during the life of the wife; she died, and, the baron not being tenant by the courtesy, the heir entered, and the husband brought an action of debt for the remaining half of the money (the former being paid in the wife's life, when the trees were removed); it was held a good action by the whole court; because the contract was good at the time of the bargain, and being entire, it could not be severed; wherefore having taken part of the oaks when he might have had the whole, the neglect was his own folly: but it would have been otherwise, if it had been agreed that he should not cut them before such a day, before which day the wife had died, for then he would not have had *quid pro quo*. In like manner it was held, that should a horse, after being sold, die in the stable of the vendor between the sale and the delivery, the vendor might have debt for the price.⁴ It was at the pleasure of the vendor to retain the horse till he was paid the price; and yet he could not have an action of debt till the horse was delivered; the property, however, was in the buyer by the bargain; so that if the buyer tendered the price, and it was refused, he might take the horse, or have detinue for it.⁵

The law allowed contracts to include things not *in esse*. Thus a man might contract for the sale of all profits and tithes to come of his land the next three or four years.⁶ Again, a person might purchase wood for so much money, if he approved it when he saw it. In such case, if he

¹ 17 Edw. IV., 1.

² 18 Edw. IV., 22.

³ *Vide* vol. iii.

⁴ 18 Edw., 57.

⁵ *Ibid.*, 22.

⁶ 21 Hen. VI., 43.

disliked it, there was an end of the bargain; if he agreed to it he was bound.¹

The personal action most favored was that of trespass upon the case, which expanded itself in a way that made it applicable to numberless cases for which the common law had not provided a remedy. The dissensions which arose on these new actions on the case are well worthy of the attention of the reader. We find new actions brought for claiming the plaintiff as the defendant's villen,² for forging a bond and putting it in suit,³ for disturbing one in his office so as to prevent his getting possession and bringing an assize,⁴ for the death of a horse lent to the defendant to be safely kept,⁵ for not making a purchase for the plaintiff which the defendant undertook to make. It was held by all the judges that an action would not lie against an innkeeper if he refused a lodging, but that the remedy was to complain to the ruler of the vill.⁶ If a man lent a horse to ride ten miles, and he rode twenty, it was the opinion of Choke that trespass was the proper remedy; but Brian held it was trespass on the case only, and he put a distinction between such misfeasances and those committed when the person acted under the authority of law, as where a distress was used, or a man would not go out of a tavern at a seasonable hour, for these were trespasses.⁷ Accordingly it was on another occasion laid down that if a bailiff cut trees without cause, or killed sheep, or if a butler broke open his master's hamper, and the like, trespass would not lie, because they had a lawful possession, but the remedy was by action on the case,⁸ and the above distinction between license in deed and a license in law was confirmed,⁹ the one being allowed to be the subject of trespass, and the other of trespass on the case. Damages and costs might either be assessed by the jury in a gross sum¹⁰ or separated—so much for damages, and so much for costs. The court had awarded increased costs to a plaintiff for the delay he had suffered by being hung up by injunction,¹¹ but in the following year the like costs were refused.¹²

¹ 15 Edw. IV., 15.

² 15 Edw. IV., 52.

³ 5 Edw. IV., 26.

⁴ 6 Edw. IV., 9.

⁵ 12 Edw. IV., 13.

⁶ 5 Edw. IV., 2.

⁷ 12 Edw. IV., 8.

⁸ 18 Edw. IV., 27.

⁹ 21 Edw. IV., 76.

¹⁰ 18 Edw. IV., 23.

¹¹ Ibid.

¹² 21 Edw. IV., 78.

The mode of trial by lay-wager was still open to much discussion. If land was let with a stock upon it, law-wager would not be allowed on account of the stock being coupled with the land, though it would lie in debt founded on a lease of the stock only.¹ By the custom of London, a defendant was excluded from his law if an alderman testified to the truth of the matter.² It was settled that in a declaration for a box of charters the defendant might wage his law. A new rule was started in the reign of Edward IV., which allowed law-wager in all cases where the plaintiff did not entitle himself to the land, for then the charter was no more than a chattel,³ but the former seems to have been the more general rule.⁴

Next to the jurisdiction of courts, the objects which present themselves are the various actions now in use. But these being the same as were so *Ejectione firmæ.* fully examined in the reign of Edward III., it will be unnecessary to add anything to the account there given except by an observation on the action of *ejectione firmæ*, and a short view of the decisions that were made respecting the nature and properties of actions on the case. Some opinions began to prevail respecting the effect of the writ of *ejectione firmæ*, which led the way to an important change in real remedies. In the reign of Edward III., and again in that of Richard II., we find it expressly laid down that an *ejectione firmæ* was, in its nature, only an action of trespass, and that the plaintiff could no more recover his term unexpired than he could in trespass recover damages for a trespass not committed, and that the only remedy for the term was in covenant against the lessor.⁵ But in the reign of Edward IV., it seems to have been held differently, for there it was said in argument that in *ejectione firmæ* the plaintiff shall recover what remains unexpired of his term, as also damages for the time it was withheld from him (a).⁶ This was only a *dictum*,

(a) This is an entire mistake, and one of the most curious instances of the tenacity of a traditionary error. Upon reference to the original authorities here alluded to, and which the author evidently had not examined, it will be found that the point was this: whether the action could be brought if the term had expired, as to which it was doubted whether it could, because it lay for recovery of a term, and the term was gone. It was, however, ulti-

¹ 22 Edw. IV., 37.

² 9 Edw. IV., 11.

³ 8 Edw. IV., 3.

⁴ 22 Edw. IV., 7.

⁵ Fitz., *Ejectment*.

⁶ 7 Edw. IV., 6.

but we shall see that, in the reign of Henry VII., it was solemnly so determined. In consequence of that decision the action of *ejectione firmæ* became more frequently used as a substitute for the many real writs for recovering possession and trying titles to land.

The criminal law received some impression from the decisions of courts during these reigns. It had been laid down that if a man had imagined the death of the king, he should be put to death for such an imagination, without having done anything, that is, without any overt act (a). Perhaps the slight circumstances that were construed *overt acts* of treason might in some measure justify the above opinion. More consonant to our present ideas was the opinion of the judges, when they determined in the reign of Edward IV. that

The criminal law.

mately held that the action would lie because it was also for damages, being an action of trespass in its nature, so that although the term was gone the plaintiff could recover damages, and if the term was not wholly expired, he could recover the residue and also damages. Thus, then, the effect of the cases are exactly the opposite of what is above supposed by the author following Hale; for the doubt was, not whether the plaintiff could recover the term, but whether he could recover anything else. In 7 *Edw. IV.*, fol. 6, it is said that by writ of *ejectione firmæ* the party shall recover the term. But it was laid down, not as a new law, but as an old established law. In another case *ejectione firmæ* was brought (21 *Edw. IV.*, 30), and it was laid down distinctly that the term *could* be recovered, except where it was at an end; when, of course, *damages* only could be recovered. Both actions were for recovery of the term, if it was in existence, but as *quare ejecit* went only upon title to the term, and *ejectione* for a tortious expulsion, it followed that if the term was at an end, in the latter action the plaintiff could recover his damages. Accordingly, in the reign of Henry VII. it was held in error that the judgment was only that the plaintiff should recover his term (*F. N. B.*, 198). Lord Hale, therefore, was in error on the subject when he says, "real actions remained until the statute of forcible entries" (which gave a summary remedy in cases of forcible entry, the most common kind of case in this age), "because there was then no known action wherein a person could recover his possession other than an assize or real action" (*i. e.*, assize of novel disseisin, or some writ of entry or of right), "for till the end of Edward IV., the possession was not recovered in an *ejectione firmæ*, but only damages." This, it has just been shown, is an error; and it is to be added, that the real reason why *ejectione firmæ* was not applied to recovery of freehold property was that, as its name imports, it was exclusively and expressly a *remedy for termors* only. To adapt it to the recovery of freehold, therefore, it was necessary that the practice of the action should be moulded so that the freeholder should sue in the name of a lessee, first a real lessee, then a pretended one. This was the real change, and it was much later.

(a) Citing a mere *obiter dictum* in a case in the Year-Book 19 Hen. VI., it is obvious that such an opinion could not be reconciled with the statute of Edward III., although the records we have of cases of treason in that reign amply support the next observation of the author (*Vide Cro. Car.*, 117.)

treason committed against Henry VI. should be punished, though that prince was stigmatized with the appellation of Usurper (a).¹ The changeableness of public affairs

(a) The reference here given is erroneous, being a reference to the case of Bagot, already alluded to in the introductory note, as showing that Henry VI. was not acknowledged as sovereign, but declared an usurper. And the case alluded to, that of Lord Grey, does not support the proposition of law sought to be drawn from it, for it is declared in the case that he was executed for his "doubleness," he having been false to both kings, so that he could not claim the protection of either (*Vide Year-Book, 4 Edw. IV., 20*). The treason, or alleged treason, for which Lord Grey was executed was against Edward, who, after 1461, claimed to have been king both *de facto* and *de jure*. The author elsewhere says: "Edward was guilty of straining the construction of the laws to gratify his resentment. It is a common story of this king, that having killed a favorite deer of a Mr. Burdett of Arrow in Warwickshire, that gentleman vented his resentment by wishing the horns of the deer in the belly of the man who had advised the king to that insult upon him, for which the king ordered him to be prosecuted for treason; and the unhappy gentleman was beheaded. He is said by others to have been prosecuted, no doubt under a fictitious charge, for poisoning, sorcery, and enchantment, and that he was attainted by parliament." The only authority cited is Stowe's Chron., 403. And then the author adds, that one Stacey was executed for a similar offence. The passage has been expunged by the editor as unworthy of the learned author, who ought not to have sought his information on such a subject from mere chronicles when authentic legal records were accessible. In Cro. Car., p. 120, the indictment in Burdett's case is extracted from the original record, and it appears that he was indicted for treason, and that the overt acts laid, were that of conspiring with Stacey and others to "calculate" the death of the king, and also by arts of magic compassing his death; and, further, it was laid that he had circulated seditious writings. "*Diversas billas et scripturas in rythmis et balladis, de murmuracionibus seditiōibus et præditiōis excitacionibus: apud Holborn in villa Westmonasterii,*"—with intent to incite the people to rebel and levy war against the king. That is, the circulation of seditious publications to induce the people to rise in rebellion was laid as an overt act of treason, instead of any act of concerting or contriving the levying of war—a crafty mode of proceeding, by which mere sedition was converted into treason, and under this form of indictment Burdett was in fact executed for mere sedition. This was the first precedent of an indictment for constructive treason, and it marks the rise of an era of arbitrary power supported by sanguinary and unscrupulous abuse of the forms of law: an age indeed in which tyranny was rested on a reign of terror kept up by a system of judicial murders. The story told by the author, and all history-writers, of Burdett, is an idle, popular tale. The true story is a terrible instance—the first of a long series—of solemn murders under forms of law, which for upwards of a century struck terror into Englishmen, and reduced them to a state of slavery under an intolerable tyranny. The system adopted by Edward IV. was pursued by Henry VII., and the sovereigns of his dynasty, and convictions for treason upon trifling overt acts or upon mere words, formed the means by which the reign of terror was kept up, under which they established the tyranny of absolute and arbitrary power. It is proper, in connection with this subject, to notice the subjects of attainder and forfeiture. Attainder was a term used to denote conviction for treason or felony in a court of law, and such conviction involved forfeit-

¹ 9 Edw. IV., 12.

made it the interest of every successive monarch to guard against conclusions that might affect the security of the present possessor of the throne.

By a statute of Edward II.¹ no one was to be construed guilty of felony for breaking prison, unless the crime for which he was committed was felony. This act does not seem to be violated by a determination in the beginning of the reign of Henry VI., where a person outlawed for felony was imprisoned in the king's bench, and being afterwards indicted for breaking prison, knowing certain traitors to be there confined, and letting them go at large, he was adjudged guilty of treason, and accordingly drawn and hanged.²

Where a man had killed the wife of his master, there

ure (*Year-Book*, 8 *Edw. IV.*, fol. 4). It is obvious that this law of forfeiture furnished in such an age a strong temptation to the crown and its servile ministers to seek to obtain convictions; and this motive no doubt operated strongly in political cases. The civil wars which had taken place, owing to the struggles between the two houses of York and Lancaster for the sovereignty, had tended to confuse the law of treason, and to introduce bills of attainder. The most remarkable event in this reign has escaped the attention of historians, and that was the attainder of Henry IV. by the title of Earl of Derby for treason against Richard II. The act is set out at length in Bagot's case (9 *Edw. IV.*, fol. 10). That it was well grounded in law and in fact there can be no doubt; for beyond question Henry, being subject to Richard, did by force of arms depose him, and put him to death, and this without the shadow of a pretence or title—as appears clearly from the recitals in the act. The legal effect would be that all the judicial acts of the reign would be null and void; and accordingly an act is still in the statute-book (1 *Edw. IV.*, c. 1) specifying such of the ordinary judicial acts of the reigns of Henry IV., V., and VI., as were intended to be legalized. No attainders are included, and it is conceived that the legal result is that all the attainders for treason under those sovereigns are reversed, if, indeed, they ever had any lawful force and effect, and it is difficult to conceive of an usurper having legal power to attain for treason the adherents of the rightful sovereign. This appears to have been overlooked by the Committee of Privileges on the claim to the Earldom of Wiltes, the first holder of which was murdered by Henry of Bolingbroke before he became even a king *de facto*. The first parliament of Henry IV., indeed, declared the "judgment" in the earl's case "good" (3 *Rot. Parl.*, 453); but there was no "judgment" upon any charge known to the law, nor could there be—the earl having only served his sovereign, and there could hardly be an attainder of a man after his death. If there could be, then Henry himself was attainted in the first year of Edward IV. (5 *Rot. Parl.*, 463); and in the course of this reign his attainder was pleaded, and it was alleged that by reason of it his honor of Bolingbroke became vested in the king (7 *Edw. IV.*, fol. 11). If there was anything that could be called an "attainder" in the case of the Earl of Wiltes, or in others of the adherents of Richard II., it was null and void according to all the authorities in this reign, which were not called to the attention of the House in Wiltes' case.

¹ *Vide* vol. iii.

² 1 Hen. IV., 5 b.

was some argument whether this was a petit treason within the statute; and after considering some cases that have been mentioned in the reign of Edward III.¹ it was agreed by the justices of both benches to be treason.² Some years after a woman was burnt, because she, in confederacy with two others, had murdered her husband; this being also deemed a petit treason.³

We find the ideas of Bracton, and indeed those of sound sense, confirmed in some opinions delivered on cases of homicide.⁴ If I am cutting down my tree, and it falls on a man and kills him, or if I am shooting, and my bow starts aside, and I kill a man, neither of these, says the book, is felony: for felony must be with malice prepense; and what happens against a man's will, cannot be said to be done *animo felonico*.⁵ It was equally agreeable with the old law to denounce the pains of felony against any who took away the life of an attainted man, otherwise than by the forms of law.⁶ It was held a good justification in an appeal of death to say, that the deceased appealed the prisoner of treason in the court of the constable and marshal, and they waged battle thereon, and so he killed him.⁷

In the reign of Edward IV. some cases of larceny happened, which created such discussions as laid open the learning upon that subject very fully. Larceny.

A man was indicted for feloniously taking and carrying away a box with charters in it: and there it was said, that it was no felony, because charters are *realty*, and not chattels real; and this was proved by a felon forfeiting his chattels real; under which description go a term for years, or a guardianship, but not his charters; to which all the judges assembled in the exchequer chamber assented; and in that case the box was adjudged to follow the nature of the charters. It was at the same time laid down for law, first, that larceny could only be committed of *chattels personal*; and secondly, in respect of the sort of *taking* necessary to constitute larceny, it was held, that where a person entrusted goods to the care of a servant, the servant could not take them feloniously, because they were in his possession.⁸

¹ *Vide* vol. iii.

³ 1 Rich. III., 4.

⁵ 6 Edw. IV., 7 b.

² 19 Hen. VI., 47 b.

⁴ *Vide* vol. ii.

⁶ 35 Edw. IV., 58. *Vide* vol. ii.

⁷ 37 Hen. VI., 20, 21.

⁸ 10 Edw. IV., 14. This case was in one of the terms that were styled 49 Hen. VI., that monarch being raised again to the throne for a few months.

A case somewhat allied to this last, was debated afterwards with great anxiety in the star chamber, before the council, in the 13th year of the same reign. One had bargained with a man to carry certain parcels of goods to Southampton. The man took the parcels, carried them to another place, broke them open, took out the goods, and converted them to his own use. Whether this was in law a larceny, was debated with much difference of opinion. It was argued, that a possession of the goods was given by the bailment of the owner; and neither felony nor trespass could be committed of them by the bailee; for he could not be said to take them *vi et armis, et contra pacem*. On the other side it was said, that a man's act becomes felony or trespass according to the intent. If a man abuses a distress, he is a trespasser, and so here all confidence implied in the bailment was superseded by the taking, which discovered his intent to have been bad from the beginning. It was also said, that this was different from a bailment; for it was only a *bargain to carry*, and what followed shows that this was only a pretence to gain an opportunity for stealing. At length, one of the justices had recourse to a refinement which admitted some of the above reasoning, but exempted this case from the conclusion following upon it. He admitted that a man who has the possession of goods by bailment cannot commit felony of them; but here, he said, the *goods* within the parcels were *not* bailed to the carrier, but the *parcels themselves*; and therefore taking *them* was not felony: but when he broke them open, and took out the *goods*, he did what he had no warrant for, and appeared in a very different light in the eyes of the law. Thus, for instance, if you deliver a tun of wine to a carrier, and he sells it, this is neither felony nor trespass; but if he takes any out of the tun, and sells it, that is felony. In like manner, if I leave the key of my chamber with any one, and he takes anything out of it, this is felony. The reason to support these cases was, that the things not specifically and expressly delivered were not in truth bailed, and therefore the party, in *taking* them, intermeddled where he had no trust.

These were the arguments used before the council: the case was afterwards adjourned into the exchequer chamber, and the opinion of all the judges was taken. There it was agreed by all the judges, except one, that generally where

goods were bailed to another, he could not take them feloniously. They held also, that when a possession so obtained had once determined, then the bailee might commit felony in taking them; as, if I bail goods to a man to carry them to my house, which he performs, and afterwards takes them, it is felony; because his possession under the bailment ceased when he delivered them at the house. They argued some points upon the nature of possession. If a guest in an inn takes a cup, he is a felon, because he had not properly a possession, but only the use of it while there. The same of a cook or butler; they are only ministers as to the things within their care; but have no possession, which, in these cases, is always construed by law to be in the master. But it would be different, perhaps, says the book, if goods were *bailed* to a servant; for as they then would be in the actual possession of such servant, he could not commit felony of them.

After all, as to the principal case, whether it was agreed, that the bailment ceased upon breaking the parcels open, and the carrier thereby forfeited the legal privileges annexed to him as bailee, and in so taking the goods he was considered as a common person; or whether it was upon the whole thought, that this was not a bailment, but merely a bargain to carry; it is not stated in the report upon which of these grounds they determined; but it was certified to the chancellor by the major part of the justices, that this man was guilty of felony.¹ It was in a few instances defined what kind of property was subject to larceny. Fish in a pond, as well as in a trunk, young goshawks, and pigeons which could not yet fly, and so were at the will and control of the owner; to steal any of these was construed to be larceny; but otherwise of the same animals when full grown, and therefore in a great measure at liberty.² In short, it was held, that only such things in which a man had a *property* could be feloniously taken and carried away.³

The old maxim of our criminal law, that *voluntas reputabitur pro facto*, continued to prevail in the reign of Henry IV. For then Shard agreed with Gascoigne, that if a man was indicted for that *il gisoit deprædando*, it was felony: Thus, says he, if a man comes to rob me, and I am stronger

¹ 13 Edw. IV., 9, 10.

³ 22 Hen. VI., 59; Bro. Coron., 190.

² 18 Edw. IV., 8.

than he, and overcome him, yet he is guilty of felony.¹ But this opinion now began to grow obsolete, for in 9 Edward IV. we find a contrary language. There Jenny says, that if one lies in wait in the road, with his sword drawn, to set upon a person, and demands his money, and a hue and cry is levied, and the man is taken, yet it is *not* felony.² This was the ruling opinion upon which the law began to settle, and men were no longer punished for crimes which they only meditated, but had not actually committed.

The rule which had long been followed, that the accessory should not be put to answer till the principal was attainted, was not found sufficient to secure a just administration of justice. It happened in the 18 Edward IV.³ that two were indicted, one as principal and the other as accessory; the principal was outlawed, but the accessory, being taken, was indicted, and, pleading not guilty, was convicted and hanged. After this the principal reversed the outlawry, and upon arraignment was acquitted of the fact, and discharged. Thus another rule of law was violated, namely, that where the principal was innocent, the accessory could not be guilty. It seems the first rule was too general, and ought to be confined to an attainder upon the fact, and not otherwise, especially when it was laid down that the accessory should not be permitted to avail himself of any error in the outlawry, which was suffered to stand in force against him till reversed by the principal⁴ in a writ of error.

Some points arose on the proceeding by appeal. In the last reign a point had arisen, whether a person
Of appeals.
 who derived his descent through a female, could entitle himself to an appeal as heir. The objection against such an appeal was founded on the express words of Magna Charta,⁵ that no one should be taken or imprisoned on the appeal of a woman, except for the death of her husband: the woman not being enabled to maintain an appeal, it was argued that an ancestral action like this, having never descended on the woman, could not descend through her to the appellant. Thus where land was given in tail male, and the donee had issue a son, who had issue a daughter, and she had issue a son, the great-grandson

¹ 13 Hen. IV., 85.² 9 Edw. IV., 28.³ Litt., 9.⁴ 2 Rich. III., 21.⁵ *Vide* vol. ii.

could not convey a title *per formam doni* through the granddaughter. Upon this reasoning the justices had determined that the appeal would not lie.¹ However, this was not considered as a decision which should close the question, for in 17 Edward IV.² the following case was depending in the exchequer chamber: A woman had a son who was murdered, leaving no heir on the part of the father; and the doubt was, whether the uncle on the part of the mother should have an appeal: and there Billing, the chief-justice of the king's bench, with Needham and Choke, were of opinion against the appeal, relying upon the prohibition of Magna Charta. But Brian, Nele, Littleton, and the chief-baron, were for it; and in opposition to the above reasoning they held, that the uncle *ex parte patris* might, beyond a doubt, have an appeal of the death of his nephew, though the father, through whom he made his conveyance, could not. It does not appear what the decision was on this occasion, though the authority seems to be in favor of the latter opinion.

It was held by some, that if a woman married pending an appeal, she might pray judgment; but that she could not institute such a suit together with her husband.³ It was an established rule that an appeal should be prosecuted in person, and not by attorney; therefore where a woman was confined by pregnancy during an appeal in which the defendant was attainted, and the woman's appearance was recorded for that term, yet the better opinion was, that she could not pray judgment and execution by her counsel. But to facilitate the progress of the prosecution, the book says, that one of the justices rode to Islington, to see whether she was alive, and whether she would pray execution, which she did, and the man was hanged.⁴

It was usual in pleading any special matter in an appeal to go on and add, *that as to the felony he says he is not guilty*. A defendant pleaded that the plaintiff had an elder brother, who was entitled to the action in preference to the appellant: it was the opinion of Markham that in this case he need not plead over to the felony, nor in any other case, except where the plea, as a release, confessed that the plaintiff had once a title of appeal; but if it was such matter as showed the plaintiff never to have had a right of

¹ 20 Hen. VI., 43.² 1.³ 21 Edw. IV., 72, 73.⁴ Ibid.

action, as bastardy, *ne unque accouple*, and the like, there he ought. It was, however, the opinion of the serjeants that the defendant, *in favorem vitæ*, ought always to plead over to the felony;¹ and that seemed to be the better practice; so that the jury might try the second issue, if the first was found against the prisoner, who would otherwise rest his life upon one issue, which, if found against him, would be equal to a conviction on the principal fact of the appeal.² Others, however, held, that after the bishop had certified against the prisoner, yet the felony might be afterwards pleaded to and tried.³

In an appeal one defendant could not plead a release to another, as one defendant in trespass was allowed to do.⁴ If an appeal was depending in the king's bench, and the issue was in a foreign country, it used to be tried by *nisi prius*; but as the justices had in this case no other authority than to try the issue, they could not, as in an original appeal commenced before them, arraign the prisoner at the suit of the king, on default of the appellant.⁵ It was a check upon this vindictive action that appellants used to be sworn to the truth of their appeal.⁶ It was now a settled course in appeals, if a defendant was charged with more than one felony, to arraign him upon all, one after the other, in order to procure for each appellant⁷ a restitution of the things stolen, a practice which had been indulged in the reign of Edward III. in a particular way.⁸ In such cases it was, however, always usual for the jury to find that the appellant had made fresh suit, and then the course was to sue out a writ of restitution of the goods stolen.⁹ It was agreed and adjudged, that in an appeal of felony a peer had not his privilege as on an indictment, but must be tried as a common person.¹⁰ There was this difference between an indictment and an appeal, that on the former the prisoner was not allowed counsel, except to matters of law, but he had every use of counsel in the latter.¹¹

Very little alteration happened in the ideas upon which provors were admitted to appeal. The statute of Hen. IV.¹² had discountenanced this mode

¹ 7 Edw. IV.

² 22 Edw. IV., 39.

³ 14 Edw. IV., 7.

⁴ 21 Edw. IV., 71; 2 Rich. III., 9.

⁵ 22 Edw. IV., 19.

⁶ 7 Edw. IV., 27.

⁷ 4 Edw. IV., 11.

⁸ *Vide* vol. iii.

⁹ 4 Edw. IV., 11.

¹⁰ 10 Edw. IV., 6.

¹¹ 9 Edw. IV., 2.

¹² *Vide* vol. iii.

of proceeding, and gave a warrant to the courts to go on in discouraging such suspicious accusers. In the 19 Hen. VI. a man being indicted of robbery in the king's bench, confessed the felony, and appealed two men of the same fact. Process was issued against one of them; the other came to the bar, and joined battel with the provor. A day was given them at Tothill, where they fought, and the appellee was worsted, and severely wounded in the head. Upon this the justices ordered him to be brought before them, and they demanded of him if he would have *any more of the battel*; to which he answered that he neither would nor could; adding, upon the oath which he had taken, that he was not guilty of the crime wherewith he was charged. Upon this the justices said, that if he would have any more of the battel, he should be put in the same situation he was in before they sent for him; but he still persisted in declining it; and it was therefore adjudged that he should be hanged instantly, which was accordingly executed at Tyburn. After this the other appellee came in and pleaded not guilty. Then judgment was given against the provor also to be hanged; for whether he who now pleaded not guilty was acquitted or attainted, the provor, says the book, ought to be hanged on his own confession of the felony; and accordingly execution was instantly done upon him.¹ It was laid down, that the appeal of a provor was for the benefit of the king, and not of himself, and that it was in the election of the justices to admit the appeal, and award process against the appellees, or to direct the provor to be hanged on his own confession.² This was putting it nearly upon the footing of that courtesy which, in modern times, has been indulged towards offenders who will consent to give evidence for the crown against their accomplices.

In the 14th of Edward IV. there is a judgment of penance, agreeing in substance with that before stated in the reign of Henry IV.,³ which seems to have continued as the regular mode of inflicting such punishment upon obstinate felons.⁴ We find a case that happened before Danby, chief-justice of the common pleas, where a felon, upon pleading not guilty, and being asked how he would acquit himself, that is, in modern language, how he would be

¹ 19 Hen. VI., 35.

² 21 Hen. VI., 28, 34.

³ *Vide* vol. iii.

⁴ 14 Edw. IV., 8.

tried, answered, *per Dieu, et notre dame Marie, et per saint eglise*. But it was recommended to him by the judge to plead in the common form, that is, to put himself upon *the country*, or he would be put to the penance;¹ the pleading not guilty, and the putting himself upon the trial *per Dieu*, without adding *per patriam*, being within the express provision of the statute of Westminster.²

The trial by battel, in criminal cases, though still warranted by the law and practice of our courts,
 Of battel. was subject to such exceptions as frequently prevented its taking place.³ It had long been agreed, that where a felon was taken with the manner, where the appellant was maimed, or above sixty years of age, or an infant, the defendant should not be permitted to try the fact in a way so hazardous to the personal safety of the prosecutor: but of late an additional exception, or counter-plea, to the battel had been admitted, which could be applied in all cases, namely, that an indictment was depending for the same fact.⁴ This being now a common mode of proceeding, the prisoner had rarely an opportunity of forcing the appellant to this barbarous decision: however, if an indictment was insufficient, it would not answer the above purpose. It was now held, that in an appeal of treason, the battel must be before the constable and marshal, and not elsewhere; and it was so laid down by Prisot, chief-justice, and Needham, one of the justices.⁵ It followed, of course, that an appeal of treason could be brought in that court only, and not elsewhere.

It had been settled in the reign of Edward III. that a felon who challenged thirty-six jurors peremptorily, should be treated as one who refused the law;⁶ but it was agreed in the reign of Henry V. that a felon might in an appeal challenge thirty-five jurors.⁷ It happened that a prisoner arraigned for coining challenged thirty-one jurors, and the jury remained *pro defectu juratorum*. Two days after, forty tales were returned, but the prisoner stood mute; upon which a jury of twelve was charged with him, and he was found guilty and hanged.⁸ The reason assigned for this measure was, that he had before pleaded not guilty; to which might be added, that he had

¹ 4 Edw. IV., 11.

² *Vide* vol. ii.

³ *Ibid.*

⁴ 22 Edw. IV., 19.

⁵ 37 Hen. VI., 20.

⁶ *Vide* vol. iii.

⁷ 9 Hen. V., 7.

⁸ 15 Edw. IV., 33.

put himself upon the country, and therefore was not within the stat. Westm. 2, and that by his silence he had waived the challenges. Where eight jurors had been sworn, and there was a default of jurors, at another day the prisoner was suffered to challenge those already sworn, for want of freehold.¹ The old common-law challenge to a juror because he was one of the indictors, which had been confirmed by a statute of Edward III.,² was qualified by a distinction that was now made between felony and trespass: it was said to be a good challenge in felony, but not in trespass, though it must be remembered that the statute speaks both of trespass and felony.³

There had been great difference of opinion, whether the plea of sanctuary should be allowed to a person who had abjured or was attainted: the more modern opinion seems to have been, that an attainted person could not claim that privilege.⁴ There was not less debate as to the granting of clergy: it seemed in the time of Edward III. to depend almost wholly on the ordinary demanding the felon as a clerk.⁵ In the reign of Edward IV., when an ordinary refused a man who prayed his clergy and read, the matter was certified into the king's bench, and the ordinary was fined, under the idea that he was only a minister of the court, and not the judge, in such case.⁶ Again, one who had abjured for felony in killing a man being taken, prayed his clergy: it happened in that case, that the man could read only two or three words here and there, and not any three words together, and yet the ordinary was pleased to claim him as a clerk; upon which it was observed by the whole court, that if it appeared to them that the prisoner could not read, the ordinary should be heavily fined, and the convict be hanged; adding, that they were the judges of his reading, for they were to make the record, *quòd legit ut clericus, ideo tradatur ordinario*: they further said, that an ordinary should be fined as well for refusing a clerk who could read, as for claiming one who could not.

It was at the same time intimated, that the reading need not be so very perfect and accurate as was pretended; for a felon being tried by Fortescue, and not being able to read, but only to spell, and so put syllables together, was

¹ 32 Hen. VI., 26.³ 7 Edw. IV., 4.⁵ *Vide* vol. iii.² *Vide* vol. iii.⁴ 9 Edw. IV., 28; *vide* 3 Hen. IV.⁶ 7 Edw. IV. 29.

nevertheless allowed his clergy. The power and effect of the ordinary's refusal was laid down by Littleton with this distinction, that if a clerk was refused *generally* he should be hanged; but if a *cause* was stated, and that was such as could not be allowed by the law of the land, namely, that he had not the *tonsura clericalis*, or *ornamentum clericale*, or the like, in such case the ordinary should be fined, and enjoined to receive the felon.¹ It was probably upon this distinction, that, some few years afterwards, a felon who could read sufficiently, but was refused by the ordinary, was hanged.²

It had been the common course for prisoners to claim the benefit of their clergy upon the arraignment: this was thought prejudicial to the party, for he had no challenge to the inquest *ex officio, ut sciatur qualis ordinario liberari debeat*, by which conviction, nevertheless, he forfeited his goods and chattels, together with the profits of his lands, until he had made purgation. To remedy this, Sir John Prisot, chief-justice of the common pleas, in concert with the other judges, in the reign of Henry VI., made an alteration, which was thought more advantageous to prisoners than the old practice (a). This was not to allow the benefit of clergy upon the arraignment, but to recommend to the prisoner to plead to the felony, and put himself on the jury *de bono et malo*: thus he had the advantage of his challenges, and the chance of an acquittal on the merits; and after all, if convicted, he might still claim his clergy. This was a variation in the practice of our criminal courts which was greatly commended, and was followed by most of his successors.³

(a) Or rather more advantageous to the Crown, which only got forfeiture upon conviction. It is idle to suppose that the interests of the prisoner were consulted in that age. The object of the Crown was to get the forfeiture by a conviction, and then the Crown cared little what became of the prisoner. But, according to the ancient law, the prisoner could not be tried if a cleric. (*Vide* vol. ii., c. x.)

¹ 9 Edw. IV., 28.

² 21 Edw. IV., 21.

³ 2 Inst., 164.

CHAPTER XXV.

HENRY VI. (a) AND EDWARD IV.

OF THE CANON LAW — OF BISHOPS — OFFICIALS — OF THINGS — OF OFFENCES — OF PROCEEDINGS IN CIVIL SUITS — THE LIBEL — LITIS CONTESTATIO — DILATIONES — MISSIO IN BONO — OF SEQUESTRATION — OF PROOF — OF WITNESSES — OF EXCEPTIONS — APPEALS — OF PROCEEDINGS IN CRIMINAL SUITS — ACCUSATION — INQUISITION — DENUNCIATION — PURGATION — EXCOMMUNICATION — INTERDICT — SUSPENSION.

WE cannot dismiss the reigns of these kings without introducing the reader to some slight acquaintance with the law and practice of our ecclesiastical courts. We are aware that such an undertaking must be attended with some difficulty and hazard; and that, in attempting it, we shall deviate from the line that has been invariably pursued by writers on the law of England. All writers upon our law, from Bracton down to Blackstone, have calculated their performances for the practisers in the courts of common law, and have accordingly taken no other notice of the clerical courts than as their jurisdiction had, at various times, interfered with that of the temporal courts. Without disputing the propriety of such writers circumscribing their inquiries, the juridical historian may be allowed to carry his views a little further. Considering the ecclesiastical courts as employed in the administration of justice equally with the temporal, he will esteem the law of each to constitute only different parts of the English law, and to demand a proportioned share of his attention. The progress of our historical inquiry makes it now necessary to turn our thoughts with more earnestness to this part of our subject. We are approaching the reign of Henry VIII., in which many parliamentary regulations were made for reforming our ecclesiastical polity, and questions of a serious nature with regard to the proceedings of the clerical courts were brought forward and discussed with great heat

(a) Here again, as this and the following chapter are occupied entirely with ecclesiastical law, which was of course substantially the same in both these reigns, there is no necessity to separate them.

during that reign, and those which immediately succeeded it. It would therefore be proper, conformably with the method which has hitherto been pursued, not to carry on the reader to so important a crisis in the history of our ecclesiastical courts, without previously possessing him of such leading circumstances in the form and conduct of that judicature, as will enable him easily to apprehend the effect of such alterations, and the scope of such controversies.

The present seems more particularly marked as the period for enlarging on this branch of our inquiry, by the appearance of our famous canonist Lyndwode. Whatever doubts might hitherto have existed concerning the nature of the jurisprudence which prevailed in the clerical courts, they seem all removed by the works of this author. In the *Provinciale*, and the Gloss upon it, we not only have a view of such constitutions as were made in this kingdom, with the interpretation put on them by that experienced practiser and judge; but we collect from him, that the oracle to which recourse was had in all cases where our constitutions were defective or doubtful, was the body of pontifical canon law. Thus are we enabled to say, upon incontestable authority, *what* the ecclesiastical law of England was in the reigns of Henry VI. and Edward IV., and for many years after. Instead, therefore, of dwelling on the boundaries between the temporal and ecclesiastical jurisdictions, the *debatable ground* which we have fought over so often in the former parts of this history, we shall now pass the borders, and explore this obscure region of ecclesiastical jurisprudence.

But before we proceed to examine the nature and extent of our national ecclesiastical law, it will be proper to take a short view of the canon law, which was the original our doctors copied in every improvement they made in the law and practice of their courts. The understanding of that system appears to be the best introduction to a knowledge of our own.

The canonists, in imitation of the Roman lawyers, and as the subject naturally dictates, divided the canon law into such as regarded the rights of persons and of things, the proceeding in civil suits, and the prosecution of crimes. The rights of persons, as they presented themselves to the mind of a canonist, were con-

of the canon law.

fined to their clerical character and function. The duty, rank, and privileges of all persons, from the pope and bishops down to those in the most inferior situations in the church, constituted this part of the canonical jurisprudence. Without entering minutely into this inquiry, we may content ourselves with a short statement of the gradation of persons who filled the clerical state, and who, having been mentioned frequently in the course of this work, ought to be better discriminated than they have yet been. The whole people of the country being divided into lay and ecclesiastical persons or clerks, they subdivided clerks as follows: into those who were *in sacerdotio*, those who were *in sacris*, and those who were *nec in sacerdotio nec in sacris*. Those *in sacerdotio* were divided into such as were *in altiori gradu, seu ordine*, and those *in inferiori*: in the former were bishops, archdeacons, and archpresbyters; in the latter were presbyters or priests.

A bishop, simply so called, presided over a single city with a diocese: a *metropolitan* (sometimes called Of bishops. an archbishop) presided over a province containing several cities. An archbishop, or primate, was a bishop to whom the metropolitan and the other bishops of the province were subject: these latter were in some places called patriarchs. The pope was reckoned among the order of bishops, with a supreme authority over them all. The *cardinals*, from whom the pope was elected, were considered as his senators, and constituting, as it were, the *senatus ecclesia*: some were cardinal deacons, others cardinal priests, others cardinal bishops; but each cardinal had nearly an episcopal jurisdiction.¹

All bishops had an ordinary jurisdiction, which was of three sorts. One was *jure ordinis*; as the consecration of churches and altars, and the ablution and purgation of them after pollution; the making of the chrism, and the ordination of clerks. The second was *lege jurisdictionis*; as the power of collecting, collating, excommunicating, instituting; taking cognizance of and hearing causes ecclesiastical. The third was *lege diœcesanâ*; as the right of exacting procuration, the *jus cathedratium sive synodaticum*; and the right of exacting and receiving pensions and tithes. All these powers could be exercised only in

¹ Corv. Jus. Can., 5-7; Launc. Inst. Jur. Can., lib. 1, tit. iv.

the bishop's own diocese, over those immediately subject to him; and that in person, or by proxy. Thus, too, an archbishop's authority went no further than his suffragans, and not to the subjects of his suffragans, except in a few cases; nor could a patriarch interfere in the causes of those who were subject to a bishop or archbishop, unless by some custom, or upon appeal. But the Roman pontiff alone could exercise episcopal jurisdiction over all churches and all Christian men, either at Rome or elsewhere.

To ease the bishop in the discharge of his pastoral care, certain persons used to be appointed; some of them in the church, as an *archdeacon* and *archpresbyter*; some of them *extra ordinem*, upon particular emergencies, as a *coadjutor* or *vicar*. An archdeacon was, by his office, next to the bishop, and took upon him the whole care and duty of the bishop *tam in clericis quàm in ecclesiis*, having the whole episcopal cognizance and ordinary jurisdiction.¹ An archpresbyter, or chief-priest, was more exalted than other priests, and was vicegerent to the bishop *in spiritualibus*. He was either *urbanus*, discharging his duty at home in the cathedral church; or *rural*, doing the like duty at a distance: the latter was sometimes called a *decanus*, or *dean*, because he presided over *ten* clerks living in the country. He had the charge of all lay persons and priests who had churches within his deanery, and gave notice to the bishop of heavy offences. Archpresbyters had only a voluntary and not a contentious jurisdiction.² A *coadjutor* was occasionally appointed to be vicegerent to a bishop or an archdeacon, in case of sickness or any other impediment: the bishop chose such a person by the advice of his chapter. Bishops, also, and other clerks, might choose a vicegerent under the denomination of *vicar*, to act for them in any emergency; and might assign him a portion of their church or benefice as a reward for his trouble. Such persons were appointed either to do divine service, and then they retained the name of *officials*, vicar; or they were appointed *ad jurisdictionem exercendam*, and then they were called *officials* and *missi dominici*. The former kind were the vicars which have been before mentioned in the reign of Henry IV.³

¹ Corv. Jus. Can., 26-28.

² Ibid., 29, 30.

³ Vide vol. iii.

The latter had the power of administering spirituals as well as temporals: thus they might excommunicate, suspend, interdict, collate, institute, confirm, elect, present, visit, correct, punish, dispense, and the like. Their jurisdiction was not deemed a delegated one, but ordinary, and the same as that of the bishop; so that an appeal did not lie from the sentence of the vicar to the bishop, but to the archbishop; though from the archdeacon and other inferior prelates, the appeal was to the bishop. This, however, was to be understood of *officials principal*, who were constituted by the bishop in his court, by a general commission of his office, not such as were appointed for some part of a diocese, who were called *foranei*. These latter had a different jurisdiction from that of the bishop, and an appeal lay from them to the bishop's consistory. It was a rule that a vicar could not substitute another vicar in his place.¹

Having said thus much on the vicars appointed by bishops, we should add a word respecting those who received a vicarial authority from the pope: these were called legates, and were either *legati à latere*, *legati missi*, or *legati nati*. The former were cardinals taken, as it were, from the side of the pope and his senate, who were sent in his name into distant provinces; the second were persons sent with like authority, not being cardinals; the last were such as had this power by reason of a certain privilege or benefice. These vicars carried with them all the pope's authority to hear all causes as *judices ordinarii*; but a certain eminence was always attributed to the legate *à latere* (a).²

Bishops were *sacerdotes* in the higher order: we now come to those in the inferior, which were *presbyteri*, or priests. Next to these come clerks that were not *in sacerdotio*, but yet were *in sacris*; as *deacons* and *subdeacons*, who were sometimes, though improperly, called priests; for priests, strictly speaking, were those only who, in the language of the canons, could perform the sacrifice of the body and blood of our Lord. The deacons, consistently with the original term,³ were to attend upon and assist

(a) Several cases in the Year-Books of Edward IV., Richard III., and Henry VII., show instances of the exercise of this jurisdiction (12 *Edw. IV.*, 16; *Rich. III.*; *Hen. VII.*).

¹ *Vicarius non habet vicarium*. *Corv. Jus. Can.*, 31, 32. ² *Ibid.*, 34, 35. ³ *Διακονοι*.

the bishop and priest in performing the divine service; and the subdeacon was a subordinate assistant.¹ After these followed what the canonists called the *lesser orders*, containing those persons who were *nec in sacerdotio, nec in sacris*. These were ordained without the sacramental unction, solely by the bishop's benediction, with a certain distribution either of vessels or vestments, and they underwent the *prima tonsura*. They were called either *psalmistæ, ostiarii, lectores, exorcistæ, or acolythi*. The duty of the first was to sing; of the next, to keep the keys of the church; the next, as the name imports, were to read the scriptures in church; the next, according to the superstition of the times, were supposed to drive away evil spirits by certain deprecations and solemn prayers; and the last prepared the wax-lights, and the like.

It was the privilege of all these orders, that no one should lay violent hands upon such as had received them, without incurring the penalty of excommunication, which could not be removed but by the pope, except in the article of death. Those in the lower orders were allowed to contract matrimony, which those in the superior orders were not, under pain of being deprived of their benefices. The gradation in which these several orders were ranked by the canonists, was this: a bishop, a priest, deacon, subdeacon, psalmist, acolyth, exorcist, reader, ostiarius; after these the canonists placed an abbot and a monastic; for, say they, all monastics, if not clerks, are inferior to clerks.² The regulars, as they were exempted from episcopal jurisdiction, were not favored by the clerical courts, and the dispensers of justice there; and they are studiously marked by the canonists as a distinct set of persons, not entitled to the privileges of clerks.

Next to the rights of ecclesiastical persons, the canonists proceed to consider the rights of ecclesiastical things. These they divided into *spiritual* and *temporal*. The former were so called, because instituted *animæ causâ*, for the good of men's souls; some of them were corporeal, as the sacraments; others, *res sacræ et sanctæ*; and others, *res religiosæ*.

The sacraments in the Romish church were seven: baptism, confirmation, the eucharist, penance, sacred orders,

¹ Corv. Jus. Can., 37.

² Ibid., 38, 39.

matrimony, and extreme unction. *Res sacræ et sanctæ* were churches, altars, the reliques of saints, vessels, and vestments. *Res religiosæ* were religious houses, hospitals for the reception of strangers, orphans, sick, and aged, churchyards and sepulchres. Such were spiritual things of a corporeal nature. Those of an incorporeal kind were such as consisted *in jure*; as a prebend, a right of patronage, annual pensions called *census*, and what was nearly allied to them, exaction, procuration, and the canonical portion: these constituted the whole of what the canonists considered as spiritual things, whether corporeal or incorporeal. Next to these followed three subjects of a mixed nature between spiritual and temporal; as tithes, first-fruits, and oblations; which were considered as mixed, because, according to the canonists, the right to them was *jure divino*, while the fruit of such right was temporal. Under the title of *res ecclesiæ temporales*, the canonists reckoned the alienation of church property, and the modes in which it could be made. Next to church property, the canonists considered the *peculium clericorum*, and how they might dispose of it by will.¹

The next object that came under the contemplation of the canonists, was the mode of proceeding in court, which they entitled *de justiciis*. Concerning this we shall have occasion to speak so particularly hereafter, that nothing need be said on it at present; but we shall proceed to the fourth object of inquiry in the canon law, which is the nature of crimes. Of offences. The canonists divided crimes into such as were comprehended in the first and in the second table of the Mosaical law. Without any observation upon this arrangement, we shall take a cursory view of crimes, as discoursed on in this clerical system of penal jurisprudence.

They began with simony, which, by a very large definition, was when anything was either given or promised for spiritual things, or for temporal things annexed to spiritual ones, as a prebend. Next to this were the crimes of Judaism, Saracenism, heresy, schism, apostacy; then homicide, which they divided into parricide and simple homicide; under which they considered those exercises or competitions that had a tendency to produce

¹ Corv. Jus. Can., 57 to 164; Launc. Inst. Jur. Can., lib. 2, *per totum*.

homicide, as tournaments, duels, and the art of shooting, all which were forbid under ecclesiastical penalties; the crime of adultery, *stuprum*, incest, rape, simple fornication, and sodomy; theft, *rapina*, or robbery, burning, sacrilege. Next to robbery and theft, the canonists chose to rank usury as an offence, say they, of a similar nature; *crimen falsi*; then *sortilegium*, *calumnia*, collusion. After these they placed such as were offences only in clerks. If a clerk indulged himself in the noisy amusement of hunting; if he struck any one; if he spoke ill of any one; if he administered to a person excommunicated, deposed, or interdicted; if a person officiated as clerk not being ordained; if a clerk did not observe the regular gradation of orders, as if he was made a deacon before he had been a sub-deacon, or a priest before a deacon; if he took more orders than one at a time, or took orders by stealth, without undergoing an examination of his qualifications: all these were offences punishable by the canon law. To these may be added all disorders and irregularities whatsoever committed by clerks in the discharge of their duty.¹ The manner in which all canonical crimes were to be prosecuted was the next point considered by the writers on the canon law.

We have given this sketch of the canon law in a cursory way for two reasons: first, because many objects of judicature which the canonists claimed, made no part of the ecclesiastical law in this country: secondly, because others, which were admitted to belong to our courts, received, notwithstanding, some alteration from our national constitutions or customs. What such alterations were, and what constituted objects of jurisdiction in our spiritual courts, will be considered in the next chapter. For the present we shall be employed on a part of the canon law, which, being adopted in our courts with less reserve, demands a more minute consideration than any other. This is the course of judicial proceedings whether civil or criminal.

The cognizance of causes, or, as the canonists called it, *judicium*, was divided into *ordinary* and *extraordinary*, or *summary*. The former was, when all the solemn forms of proceeding were observed by a libel, contestation of suit, and the other steps which will be

¹ Corv. Jus. Can., 287 to 344; Launc. Inst. Jur. Can., lib. 4, tit. iii., usq.; ad. tit. 10.

mentioned presently. The extraordinary, or summary, was, when the solemn forms were dispensed with, and they proceeded *ex officio judicis*, either by inquisition, denunciation, or some other course *de plano*, as they termed it, upon general principles of equity. Another division corresponded with that of the temporal jurisdiction, into *civil* and *criminal*.

Judges, in like manner, were considered by the canonists in two lights, ordinary and extraordinary. Of the former description were archbishops, bishops, legates, and others having authority from the pope. A bishop might exercise his jurisdiction in any part of his diocese that was not exempt, either in person or by another, by hearing all ecclesiastical causes, and correcting all ecclesiastical persons who offended. An archbishop had jurisdiction over his suffragans, but not over the persons within the dioceses of his suffragans, unless in some special cases that were exempted. An extraordinary judge was an *arbiter* chosen by the parties, or a *delegate* who received commission from some superior to hear a particular cause. A judge might be delegated by an ordinary, or by a delegate of the pope; but the delegate of an ordinary could not delegate another, unless the original delegation had included all causes in general. It was not only the cognizance of a cause generally, but any part of the proceeding that might be delegated: thus the beginning, as the citation, and *litis contestatio*, might be delegated to one; the middle, containing the remainder down to the definitive sentence, to another; the definitive sentence and execution to another.¹

In considering the nature of proceedings in the ecclesiastical court, we shall begin with civil causes, and with the ordinary jurisdiction. The commencement of a civil suit in the ordinary jurisdiction, consisted in the citation of the defendant, or *reus*. Citations were of different kinds; they were verbal or real. A verbal citation was either public or private. A public citation was by fixing up publicly the letters of citation (which too was called *edictalis citatio*), or proclaiming them by the mouth of a crier, or by a bell or trumpet. A private citation was, when a person was cited by a messenger, the party, or a

¹ Corv. Jus. Can., 165 to 172.

notary at his own house. It was called a real citation, if the person of the party was apprehended. The *citatio edictalis* was to be made use of only where a person could not be otherwise cited: as if it was unsafe to attempt to come to him, this citation was to be affixed in some place near the domicile of the party, so that he might be reasonably supposed to have knowledge of it.

To constitute a legal citation, it was necessary that it should be made at the command of the judge, by an apparitor, at the instance and request of the suitor; without which no judge could cite a person in a private suit, though he might in a public one. All parties interested were to be cited, unless, indeed, they were persons of dignity and rank; for such were not to be cited, *nisi veniâ prius impetratâ*, under a heavy penalty. A citation issued not only at the opening of the suit, but in the various stages of the cause, wherever any *cognitio* was to be made to expedite it. Every citation was to contain certain formalities; it was to have the name of the judge, the *nomen* and *cognomen* of the party cited, and of him at whose suit it issued; the cause of citing, the place of judgment, the day and *terminus* for appearing. The place need only be mentioned in cases where the judge was a delegate, because the ordinary's court was certain and known. A citation was to be made either by three *edicta*, at the interval of ten days each, or by one peremptory edict, containing the same space of time as the three *edicta*; and such peremptory time was not to be shortened by the judge but for some special cause expressed in the citation.

If the party was regularly and lawfully cited, he ought to appear, otherwise he need not; but an irregular and unlawful citation would be cured by a voluntary appearance. Indeed the party's non-appearance would be justified in many cases; as if he had been spoiled of the thing in question, and was not first restored to it; if he was hindered by his adversary; was cited to a higher tribunal; was detained by sickness, or other like cause: but as soon as such cause was removed, he was to present himself before the judge. As soon as a citation had issued and was served, or the service was prevented by the party himself who was cited, then the suit was considered in law as *lis pendens*.¹

¹ Corv. Jus. Can., 172, etc.

It often happened that a cause once commenced, would go off upon an agreement between the parties: this was either by a *pactum* or a *transactio*, or by submission to an arbitrator. The two former, which may properly be considered as judicial agreements, were thus defined by the canonists: *Pactum*, say they, is *inter partes ex pace conveniens scripturâ, vel, sine eâ, legibus ac moribus comprobata sententia*. *Transactio* is defined *rei dubiæ et litis incertæ, neq; finitæ, aliquo dato vel remisso, conventa decisio*.¹ From the terms *sententia* and *decisio*, as well as from the occasion on which the canonists mention these two agreements, they must be considered as having a sort of judicial sanction; and they naturally bring to the reader's mind the account we have given of a fine, in the early parts of our history.² A submission to arbitrators was another way of compromising the subject of a suit: while an arbitration was depending, the jurisdiction of the judge was held to be suspended.³

If the parties could not agree to compromise the matter in one of these three ways, they must resort to the judgment of the court, in order to which it was usual first to appoint a *procurator*, or *proctor*, who was to act as attorney through the suit. Whether the appearance was by proctor or in person, the next step was for the complainant to state his cause of action. In summary causes, and some others, this might be done *vivâ voce*, without any writing, either by the advocate or in person; but in other causes it was to be done in writing, which was called *libellus*.

The libel.

A libel in civil causes was either *conventionalis*, or *postulatorius*; in criminal cases, *accusatorius* or *querimoniales*. In the latter cases, a libel was to contain the day and year, the *nomen* and *cognomen* of the accuser and accused and of the judge, the crime, the time when it was committed, together with the *inscription*, which will be explained hereafter. A conventional libel, in like manner, was to contain the names of the parties, of the judge, and of the thing in question, with the quality of the action;

¹ Corv. Jus. Can., 181, 183.

² Vide vol. i. This coincidence in the civil law (from which the canonists took it) has been noticed by Mr. Cruise in his *Essay on Fines*.

³ Corv. Jus. Can., 187. A submission to arbitrators is called by the canonists *compromissum*; hence our word compromise. [Thus from the canon law was derived that most valuable and beneficial proceeding by arbitration, which it has been the object of modern legislation to enforce and extend as much as possible.]

though it was not indispensably necessary that the name of the action should be mentioned. The libel should be tendered by the *actor* both to the judge and the *reus*.¹ If the *reus* made any answer, or denied a part, or the whole, this constituted a *litis contestatio*.

Perhaps the *reus* would rather choose to meet the *actor* in some other way; for if he had any demand upon him, he might *reconvenire*, as they called it, that is, make a cross demand upon him.² A *reconventio* was proper or improper: the former was such as was instituted at the beginning of the original cause, and went on *pari passu* with it; the latter was such as was made at any time before the conclusion of the cause. A *reconventio* was always to be before the same judge as the *conventio*, whether he was an ordinary or delegate; but not before an arbitrator, nor a judge of appeal; it might be had in all causes, except criminal, those of spoliation, and some few others. The matter of the *reconventio* was to be put into a libel before the *litis contestatio*, or immediately after, and then would go on with the original suit: indeed they were considered as one suit only; for they had the same parties and judge: there was to be one sentence; and if an appeal was prohibited in the first, it was prohibited in the second also.³

When the preparatory parts of the action were gone through, then followed the *litis contestatio*, which *Litis contestatio.* the canonists called *ipsius judicii principium et fundamentum*. It was truly the foundation of the judgment; for till that happened, there could be no examination of witnesses, nor definite sentence; and the whole process, of course, was at a stand. The *litis contestatio* arose from the conflict between the intention of the *actor*, exhibited in his libel, and the answer of the *reus*, which ought always to be calculated to contest the matter there suggested. If the *reus* in his answer made a plain narration of a fact, not accompanied with a denial, there was no *litis contestatio*. A *litis contestatio* was regularly necessary in every cause that was conducted in the ordinary process, and not *de plano*, without the figure and solemnity of judgment. The effect of the *litis contestatio* was various: it perpetuated

¹ Corv. Jus. Can., 187, etc.

² *Reconventio* is defined by the canonists to be *mutua petitio contra convenientem vel agentem, in eodem judicio constituta*.

³ Corv. Jus. Can., 193, 194.

the jurisdiction of the judge, and the action, if temporary ; no innovation could be made to the prejudice of either litigant ; it prevented a prescription running ; it made the matter in question litigious ; and the *actor* could not alter his libel.¹

Notwithstanding what has just been said, there were some cases in which witnesses might be examined even before the *litis contestatio*. Thus, if there was any apprehension that a witness might die, or be long absent, the judge, whether ordinary or delegate, might admit him to be examined ; and this was done both in civil and criminal causes ; in the latter, it was not allowed in the absence of the other party ; in the former, it was, if there was any danger in the delay ; if not, the adverse party should be cited to see the witnesses sworn, and to tender interrogatories. Witnesses might be examined thus prematurely in the following cases : if it was a question merely spiritual, and involving no benefit to any private person, as the crime of heresy ; if the public safety was endangered ; if the state of the church was concerned ; in a cause of denunciation or of appeal ; if the appellee was contumacious ; in a matrimonial cause, if the other party was maliciously absent ; in a case of dilapidation or purgation ; wherever anything was to be done *ex officio judicis* in relation to an action, as concerning costs of suit ; and in all cases where the proceeding was simple and *de plano*.

Witnesses might be produced in this manner both by the *actor* and *reus*, though under different considerations. The *actor* might examine if they were old or infirm, and he was not at liberty to bring his action just at that time, as where a debt was due on a condition not yet broken. The judge was to decide as to the age, infirmity, or absence of the witnesses. When the witnesses were so received, the *actor* was to bring his action within a year from the time at which he was entitled to an action, or at least denounce to the *reus* the receipt of the witnesses. A *reus*, without any suggestion of age, infirmity, or absence, might indifferently produce any witnesses, provided he had a ground of exception, which, though not sufficient to found an action, might be enough to bar the action he apprehended. Witnesses examined in this way were to be produced before the

¹ Corv. Jus. Can., 195–197.

judge who was competent to the principal cause; the other party, as was before said, should be cited, unless the speedy death of the witness was apprehended; and then it might be, not only in the absence of the other party, but before a judge who was not competent to hear the principal cause.¹

After the contestation of suit, there were several steps to be taken before the definitive sentence could pass. These may be considered as of three kinds: first, the *juramentum calumniæ*; secondly, the *dilationes*; thirdly, the process against the *reus*. The *juramentum calumniæ*, or oath of calumny, was taken by both the parties litigant, who respectively swore that the cause was commenced, and should be carried on and defended, *bonâ fide*, for the sake of justice, and with no malicious design. The judge could not impose this oath but at the desire of the other party; and should either refuse, the consequence was fatal, for the *actor* would lose his action, the *reus* the thing in question, as if he had confessed the demand. All litigants were liable to take this oath, and they might take it themselves, or by their proctors; but a proctor to take this oath should have a special warrant, and then he might swear, as the canonists expressed it, *tam in animam domini quàm suam*. It was to be taken in all causes where any proof was to be made, whether in a criminal or civil suit. Besides swearing to the justice of their cause, they were also to swear that they had not given, nor would give, anything to the judges or others, except the honorary rewards to the advocates, and the like lawful presents; and also that they would not require any proof which they did not think absolutely necessary.²

The *dilationes*, or allowances of time for the performance of any judicial act, were termed either *legales* or *Dilationes. arbitrarie*; the former being such as were ascertained by law; the latter being dependent on the pleasure of the judge, who made them longer or shorter according to the nature of the case, and the circumstances of the parties. These latter dilations were to be given by the judge sitting on the bench, in the presence of both parties; to the former the parties were entitled of course, though they might be qualified by the discretion of the judge. The usual occasions on which one or other of them were allowed, was for

¹ Corv. Jus. Can., 197-199.

² Ibid., 199, 200.

producing witnesses, for proving instruments, for purgation, for contestation of suit, and the like.¹

Some other circumstances were considered as species of dilations. Among these were *feriæ*, or such days as were always exempt from judicial proceedings of every kind; and the *ordo judiciorum*, by which the due course of hearing each cause was prescribed. Thus a principal cause was to be heard before one that was only incidental to it; a criminal cause was to be heard before a civil one.² A *plus petitio*, as they called it, might be reckoned among the *dilationes*; this was when the *actor* demanded more than he was by law entitled to; in which case he lost his action, and paid single, double, or treble costs, according to the nature of the excess in the demand.³

One instance of the *ordo judiciorum* was, when a *petitory* (or, as we should say in English, an action upon the right) and a possessory clause concurred. Thus the *actor* going on in a *petitory* way, and the *reus* complaining, perhaps, of a spoliation, made a cross demand of a possessory nature, whether of the same thing, or of some other. If it was of the same thing, the possessory question was first to be determined; and that upon the right, though first brought, was to be suspended. If it was for a different thing, there was a distinction; for the possessory demand might be made either by way of reconvention, by way of action, or by way of exception: if in the first, then the two questions went on together, and there was only one sentence, as was observed before: if in the second way, then the possessory question was first to be determined, whether the person spoiled was sued civilly or criminally by the *actor*; for it was a rule, *spoliatus ante omnia est restituendus*; if in the latter way, the exception of spoliation was to be first decided, and then that upon the right. The person who sued for the right was at liberty, before the conclusion of the cause, to sue for the possession, though not after, unless for some special cause. If a person sued at once both for the right and possession, they were both determined by one sentence; and the person who lost upon the possession might afterwards go upon the right.⁴

A spoliation was defined to be *violenta possessionis privatio*. It might happen both with respect to movable and

¹ Corv. Jus. Can., 201.

² Ibid., 205.

³ Ibid., 206.

⁴ Ibid., 207.

immovable things; to rights, and to benefices. If a judge unlawfully deprived any one of his right by judgment, it was construed a spoliation. A person who commanded a spoliation to be made, or who acknowledged it to be made in his name, or who received the thing from the spoiler, was held the same as the spoiler. A person spoiled might complain either by action, reconvention, or exception: in the first case, he was to be first restored; in the second, both questions were to be heard *pari passu*; in the third, he need not answer till he was restored. A restitution, if made, was to be with the fruits, and the loss sustained.¹

The next consideration is the process which issued against those who were contumacious. A person who was lawfully cited, and, being under no lawful impediment, did not appear in person, or by a proctor; or if he appeared, but did not conform himself, or departed without the judge's leave, in all these cases such person was held contumacious. A lawful citation (as has been shown) was by three *edicta*, or one peremptory, containing the same space of time as the three edicts. The contumacy, whether of the *reus* or *actor* (for he also might be contumacious), was punished differently, and according as there was a *litis contestatio* or not; and the judge need not inflict all the penalties at once, but one after another, as the party appeared less likely to submit himself.

If the *actor* did not appear at the time to which he had cited the *reus*, he was to pay costs to him, and could not have a new citation without giving security for his own appearance at the new appointed time. The *reus* also, if there had yet been no *litis contestatio*, might require that the *actor* should be cited; and if he did not then appear, that he himself might be admitted to make proof, and sentence be passed. If the *actor* was contumaciously absent after the *litis contestatio*, and all but six months of the *tempus instantiæ* (which was usually three years) was elapsed, the judge, if the case was a plain one, might proceed to a definitive sentence, even in favor of the *actor*, provided the right was on his side; otherwise in favor of the *reus*, by absolving him, and condemning the *actor* in costs.

¹ Corv. Jus. Can., 208. Launc. Inst. Jur. Can., lib. iii., tit. 10.

If the *reus* was contumacious, either a mulct was inflicted on him by the judge, or he was condemned to pay the *actor* his costs and other damages; or he was excommunicated, or suffered a *missio in bona*. A *reus*, if contumacious, was sometimes said to be *verus*, and sometimes *fictus*; the first was one who, being personally cited, or by three edicts, did not appear; or appearing, would not answer: the latter was one who had been only cited at his house; unless, indeed, the citation had been communicated to him by his friends or domestics:¹ and there was this difference between the two, that the latter might appeal, but the former could not.

The *missio in bona* was different where there had been a *litis contestatio*, and where not. After the contestation, if the judge was not clear in the justice of the cause, he put the party into possession of the goods of the *reus*, so as to make him only the real and true *possessor* thereof, leaving to the absent *reus* to maintain a question upon the *right*. If the cause was a plain one, then he passed a definitive sentence. If there had been no contestation, as he could not properly come to the merits of the cause, there was only a simple *missio in bona*, which was done by means of a *decretum*. There was a first and second *decretum*: by the first there was a *missio in possessionem bonorum*, merely for custody. This process might be had by all persons to whom there was an absolute debt due, not by those who had a debt only *sub conditione*; unless, indeed, where the party was a legatee. The *missio* was first into possession of movables, then of immovables, and lastly of incorporeal things. There was, however, a difference between a real and personal action. In a real action the *missio* was *in bona petita*, of which the party became the true *possessor*, and after a year, and not before, he might take the fruits: within the year, the *reus*, if he purged himself, might come, and on giving security to stand to the suit, and paying the costs, he would have restitution of the goods taken. In a personal action, the *missio* was in proportion to the debt, and the *actor* did not obtain possession, but only held it, together with the owner, in a sort of custody. The *reus*, whenever he appeared, so as it was before the second *decretum*, was to have

¹ Corv. Jus. Can., 209-211.

restitution, upon giving security to stand to the suit, and refunding the costs.

The second *decretum* was not necessary for acquiring possession in a real action, for that we have seen was done by the first, but it was necessary in a personal one; for by means of this, after the *reus* persisted in his contumacy, the *actor* was put into possession, so as to continue the true and unchangeable owner of the thing so taken. This did not issue till a year after the first *decretum*, and was at the prayer of the party. As in the former case, so here, restitution would be made if the party appeared, or gave security for standing to the suit, and paid the costs; or indeed if any just impediment could be shown to have prevented his coming. It seems to have been left to the discretion of the judge, in what manner he would order the things taken under a *decretum*. Thus, he might either order them to be sold, or to be delivered in payment of the demand; if a debt, he might either make the *actor* real proprietor of them, or give him only possession. The process of *missio in possessionem* was allowed only in profane matters, not in cases where any dignity or benefice, or other ecclesiastical matter was in litigation; for then, instead of this process, they either proceeded to a definitive sentence, or the contumacious party was pursued by ecclesiastical censures.¹ It is for the reader to judge whether the framers of our real process by caption, as related in the early parts of this history, had any eye to this canonical proceeding.²

Another way of proceeding in cases of contumacy was by *sequestration*. This was depositing the thing in question, or the fruits of it, by consent of the parties, or by the authority of the judge, in the hands of a sequestrator, for safe custody, to be restored to the successful party in the suit; so that it was either *conventional* or *judicial*. That a person might not be deprived of the possession rashly, which was like beginning with an execution, this was confined to particular cases. If the judge apprehended that the parties might come to open violence; if the person who was *missus in possessionem* by a *decretum* was wasting the fruits and produce, and the like, such was a proper occasion for a sequestration. Things, whether movable or

¹ Corv. Jus. Can., 211, 212, etc. Launc. Inst. Jur. Can., lib. iii., tit. 6.

² *Vide ante.*

immovable, were subject to sequestration; though it would not be allowed of a benefice, if any question arose against a person who had been full three years in possession.

A conventional sequestration passed into what they called a *sequestral possession*, unless there was an agreement that it should only be for safe custody; and if it did, the sequestrator had all the advantages of possession; that of taking the fruits and produce, of presenting to benefices, and the like. A judicial sequestration did not convey the *possession*, but that awaited the definitive sentence. Any person who hindered the sequestration of an ecclesiastical benefice, or the receiving the fruits of it, incurred excommunication, from which he could be absolved only by restitution; and if he was one of the parties he would lose the benefice and whatever right he had therein.¹ It should be observed that the whole process for a *missio in possessionem*, and for sequestration, were exceptions to the rule, that *lite pendente nihil esset innovandum*, which was most rigidly adhered to in all other respects.²

Thus far of the *reus*, when contumacious; the next considerations are when he came in and confessed, or denied the charge against him. A confession consisted not only in a plain admission of the charge, but might be collected from circumstances, the strongest of which was silence. If, on interrogation, he should contumaciously refuse to answer, or should not deny the allegations of his adversary, this amounted to a confession. A confession had the force of a sentence; so as that the judge, if proceeding *de plano* without the form and solemnity of a judgment, need not pass sentence upon the person confessing; but if he was proceeding in the ordinary course, he must give sentence; the same also in criminal matters.³

If the *reus* denied the libel, then the *actor* was required to prove it. Proof was divided into artificial and inartificial: the former was such as could be deduced by argument from the thing itself: the latter consisted in such things as were out of the cause; as witnesses, instruments, confession, an oath, and the like. Proof was again considered in two lights; either as *plena* or *semiplena*. The first was such as wrought on the mind of the judge *plenam fidem*: such was a proof by two wit-

Of proof.

¹ Corv. Jus. Can., 216, etc.

² Ibid., 215.

³ Ibid., 218, etc.

nesses, by a public instrument, by presumption, the judicial confessions of a party, the evidence of the thing. The latter was such as had only an imperfect effect on the judge's mind, not producing such a faith as he ought to acquiesce in; as by one unexceptionable witness, a private instrument, comparison of hands, an extrajudicial confession, argumentation, report, and the like. However, several half proofs might be so put together as to make one full proof, as where they tended to one end and not to several; and this, whether they were of the same kind, as two witnesses, or of different kinds, as one witness and a report. But if these proofs went to different objects, as one witness to prove a report, another to prove a flight, it would not suffice; because, to make a full proof, each ought to be proved by two witnesses.

In some cases the canon law was content with something less than proof, where a probable presumption could be raised; as in a case of simony, which was always committed in secret. Proof consisted either in witnesses, confession, instruments executed with due solemnity, the evidence of the fact, report, ancient books, and writing on stones or columns, letters under the seal of a bishop, cardinal, abbot, or chapter, common opinion, *indicia indubitata*, violent presumption. If the *actor* brought a full proof, he need not take an oath himself.¹ Two sorts of proofs, that which consisted of witnesses, and that which depended upon instruments, deserve more particular consideration: and first of witnesses.

The competency of witnesses was measured by the canonists by much nicer considerations than any that operated in our law of evidence. The objections to a witness were such as were absolute, or such as applied only between particular persons. Of the former kinds were the following: that he was not arrived at puberty (unless indeed in cases of læse-majesty, where this was not an objection); that he was mad, or of non-sane memory; an infamous person, as an usurer, or one condemned by a public judgment; one who had been convicted of receiving money, either for giving or withholding his evidence; one condemned either for speculation, for a libel, calumny, or adultery; a heretic (but this

¹ Corv. Jus. Can., 220, 221, etc.

was no objection where he was to give evidence against a heretic); a perjured person; a woman who was or had been a common prostitute; and all persons who were stigmatized by the secular laws.

Between particular persons, it was held that a domestic, a familiar friend, a relation by blood or marriage, one who could be influenced to be a partial witness; all these were prohibited from becoming witnesses for any person towards whom they stood so circumstanced, but not from giving evidence against him: nor were they prohibited from giving evidence in a cause for proving consanguinity, or any matrimonial matter. On the other hand, a person who had confessed himself guilty of a crime, could not be witness against an accomplice, except in certain heinous and more secret offences, as *læse-majesty*, heresy, or simony: an enemy could not be permitted to be a witness against an enemy; a freedman against his patron; a son against a father, or a father against a son, unless in a matrimonial cause; nor a heretic or Jew against a Christian; nor a layman against a clerk in criminal causes. A woman could not be witness to a testament, nor in a criminal cause, if instituted criminally, though she might if it was prosecuted civilly. No one could be witness in his own cause, nor could the advocate or proctor.¹

The number of witnesses ought at least to be two, whether in a civil or criminal suit; nor, say the canonists, would less be received even from a person of dignity and rank. The latter were great considerations in the article of testimony: thus to convict a cardinal bishop, seventy-two witnesses were required; a cardinal presbyter, forty-four; a cardinal deacon, twenty-four; a sub-deacon, acolyth, exorcist, reader, ostiarius, seven; and yet, if the witnesses were of known good life and conversation, two or three, it was thought, might suffice even in these cases of such prodigious caution. Yet in the purgation of a bishop they invariably require twelve; of a presbyter, seven; of a deacon, three: three witnesses also were required to prove a will.

Although it was a general rule that one witness, whatever was his dignity, could prove nothing, there were

¹ *Corv. Jus. Can.*, 224-226.

exceptions of cases where he was allowed, if no prejudice could happen to any one: as when it was doubted whether a person was baptized, whether a church was consecrated, and the like; when the will of a dumb or expiring person was to be proved; when a marriage was to be destroyed by pretext of consanguinity; and, as was before mentioned, in cases of læse-majesty.¹

It was held, that a witness should not offer himself voluntarily, but should be called, and, as it were, brought in against his will; and a person who came voluntarily was considered as a suborned and suspected person. He was to be produced and received after the contestation of suit, and not before, unless there was an apprehension of his death or absence; or unless it was in a cause of matrimony or election, or in a prosecution by inquisition or denunciation. The production should be before the judge who took cognizance of the cause, unless the witnesses were infirm, old, debilitated, or very poor, so as not to be able to come to the place where the judge was, for then they might be examined by proper persons who were to be appointed for that purpose.²

Before the judge proceeded to the examination, he was to admonish the witnesses of the heinousness of perjury, and then require from them an oath. An oath was taken differently by different descriptions of persons: thus, by the canon law, all seculars swore, *tactis sacrosanctis scripturis*; all regulars swore, *propositis evangelis, et manu ad pectus admotâ*. After the oath was taken, the judge was to examine the witness apart, without the presence of the parties, or any one, except the notary, who was to take down the examination. The questions were to be formed upon the articles exhibited by the adverse party, and upon interrogatories or inquiries concerning the persons of the witnesses themselves: they were to be asked as to the occasion of their knowledge, the time, place, and the like; to all which they were bound to answer.³ A witness was not to depose upon his belief or hearsay, unless it was supported by something that corroborated, or where it was in case of some ancient right, and he spoke from the reports of old people.

After the deposition was made, the judge was to read

¹ Corv. Jus. Can., 227.

² Ibid., 228.

³ Ibid., 229.

the whole, whether upon the articles or interrogatories to the witness, that he might correct what he had said, and then he was to dismiss him with strict injunctions of silence. The judge was likewise to endeavor to prevail with the parties to renounce any further production of witnesses; otherwise they might, within the time allowed by the judge for production, go on to a third production of witnesses upon the same articles:¹ but they could not make a fourth, unless the party took an oath of calumny, swearing that he did not do it for vexation, and that he had not had a copy of the depositions; for when the depositions had been once published or known, there could be no further examination on those articles, though there might on new ones.

When the depositions were published, a copy was to be given by the judge to the parties litigant, to make their exceptions if they chose; which, however, was not to be done, unless they had protested and made mention of such an intention, either before or at the time of the publication. Such an exception was to be proved by witnesses, who were called *testes reprobatorii*, or by instruments which might be reprobated, as they called it, by others; and beyond this there was no further vying and revying.² When the exception was proved, the judge was then to give sentence according to the credibility of the evidence on both sides. If they seemed to be on a balance, judgment was to be given for the *reus*, unless the side of the *actor* was such as the law treated with peculiar favor; as a case of dower, of a testament, a pupil, widow, orphan, the church, the *fiscus*, legitimation, and some others.³ If a witness would not readily attend, he might be compelled by the judge, unless he was privileged by some lawful excuse: thus a person was not to be compelled to give testimony against a father-in-law or son-in-law, a step-father or step-son, a cousin-german or cousin-german's son, nor against any person standing in the first degree of blood; nor a freedman against his master; nor a man aged and infirm; a soldier, one absent upon any service, a bishop, a clerk, or other ecclesiastical person. Yet if the truth could not be made out in any other way, the above persons might be

¹ Corv. Jus. Can., 230.

² Ibid., 231.

³ Ibid., 232. Launc. Inst. Jur. Can., lib. iii., tit. 14.

compelled to give testimony: but no witness was obliged to attend, unless his expenses were tendered him.¹

Thus far of witnesses: the next consideration is the nature of *instruments*. Instruments were divided into public and private. Of the former kind were those made by public persons, as notaries; or under some public seal, as the seal of a bishop, a chapter, a prince; or published by authority of a magistrate; such as were subscribed by the person making it, and by two witnesses, so long as the witnesses were alive; such as were taken out of public archives. Private instruments were those made by private persons without witnesses, as accounts, private remarks, letters, cautions, and the like.² These of themselves were not proofs, except against the person penning them, and not denying them, or the person accepting them; unless, indeed, they were confirmed by the subscription of witnesses, or the contracting parties, or by length of time, or some judicial recognition. Respecting public instruments, there was this difference: such as were made before a judge amounted to full proof, and no proof to the contrary would be admitted; such as were made by a notary also, if attended with all the due solemnities, amounted to full proof; nevertheless, a proof to the contrary would in this case be admitted. The due solemnities were not the subscription and subsigning of the contracting parties, and of witnesses, but the name and seal of the notary, with the year, place, and so on.³ Instruments, like witnesses, were to be produced after the contestation of suit, and before the judge in the cause. If the *actor* was deficient in his proofs, it was sometimes the practice to allow him to supply that deficiency by his oath.

When the *intentio* of the *actor* was proved in one or other of these ways, the *reus* would be condemned, unless he could defend himself by some exception.

Of exceptions. Exceptions were divided into dilatory and peremptory: the former were either such as were *declinatoriæ judicii*, or *dilatoriæ solutionis*. Declinatory pleas either went to the person of one of the parties, or the proctor, or the form of the action. Those that were *dilatoriæ solutionis* were only to defer the claim, which was admitted to be

¹ Corv. Jus. Can., 232, 233.

² Ibid., 234.

³ Ibid., 235.

due, but not demandable till a future day. Peremptory exceptions entirely did away the action; and they were divided into those that were *peremptoriæ litis finitæ*, and those *simpliciter peremptoriæ*; the former of these impeded the very commencement of the suit, and might be pleaded *ipso judicii limine*: the latter did not impede the commencement of the suit, but might be pleaded after the contestation of suit in any stage before sentence. Dilatory exceptions that were *declinatoriæ judicii*, were to be pleaded at the commencement of the suit, and, if omitted, could not be pleaded after; those that were *dilatoriæ solutionis*, might be pleaded after the libel, before contestation, within the term assigned by the judge; and yet a dilatory plea might come after the contestation, in some particular cases; as where the matter was new; or where, though it arose before, it did not come to the knowledge of the person pleading it till after the contestation; if the judge had reserved to the party such a ground of exception; if it was excommunication. The judge had a discretion in appointing the time for propounding an exception. A person might have many exceptions, and those contrary ones; and if the judge refused to admit them, the party might appeal.

Next to the exception came the replication; and there the parties stopped, at least with respect to producing witnesses; for to avoid the protracting of suits, it was a rule *illos tertio refutare non licet*. A replication might be put in at any stage of the suit. As the *reus* was not called upon to prove his exception till the *actor* had proved his *intentio*, so he need not prove his replication till the other had proved his exception. The time for replying was in the discretion of the judge.¹

After the pleading and proofs, the judge was to pronounce sentence *secundum allegata et probata*. In order to this, the parties litigant were to be cited either by three common edicts, or one peremptory, containing the space of three edicts. A sentence, if passed legally, and no appeal made from it in ten days, was considered as *res judicata*.² Upon this execution followed. There was some difference in the suing of execution in a real and personal action. In the former, it was to be made imme-

¹ Corv. Jus. Can., 249-256. Launc. Inst. Jur. Can., lib. iii., tit. 8.

² Ibid., 263, 264.

diately upon the expiration of the ten days allowed for an appeal; in a personal one, not till the end of four months. The only execution allowed by this law, was by the spiritual arms which the church had assumed; by suspension, deposition, excommunication, or degradation. If such ecclesiastical censures had not their effect, the secular arm was implored; and if the secular judge refused his aid, the church pursued him with excommunication.¹

Having led the reader through the whole course of proceeding in ordinary cases, it follows that we
 Appeals. should consider the nature of an appeal from a sentence, and the execution thereof. An appeal might be either before or after definitive sentence, and was always from an inferior to a superior judge. An appeal before a definitive sentence was from an interlocutory one, or any injury felt by the party; as if he was cited to an unsafe place, or at a shorter day than was customary.² For it was a rule in the canon law, that an appeal might be made from every *gravamen* by which a litigant felt himself injured; so that an appeal was considered as a species of defence for the protection of innocence in all cases. An appeal after definitive sentence might be either from the sentence, or the execution of it, if it was unlawfully grievous. An appeal, however, did not lie for a person who was sentenced for a real contumacy, or for a manifest crime; or for one who had confessed and was convicted upon such confession; nor for one who had bound himself by oath (as was not uncommon) to bring no appeal.³

An appeal was to be made *gradatim*, from an inferior to a superior judge: thus from the ordinary of the bishop to the bishop himself; from the official-general of the bishop, and from the bishop to the archbishop. But an appeal might be made to the pope, or his legate, *uno saltu*, without going through the intermediate gradations. Yet an appeal to the pope did not remove the cause to the court of Rome, but it was to be determined by delegation in the place where it arose; unless in some particular cases where the pope was satisfied that a delegation could not be made without a failure of justice. From the pope there was no appeal.⁴ An appeal lay both in a civil and criminal cause, unless in some particular cases where it was prohibited.

¹ Corv. Jus. Can., 265, 266.

² Ibid., 267.

³ Ibid., 268.

⁴ Ibid., 269. Launc. Inst. Jur. Can., lib. iii., tit. 17.

Thus no appeal could be had so as to prevent the opening of a testament, and to restrain the heir from coming to his right; nor from an execution, unless, as was before said, it was unlawful and grievous;¹ nor from the correction of regular discipline, unless that was made also unlawful and grievous; nor from a sentence of interdict and some others.

An appeal might be made *instante*, *vivâ voce*, by the word *appello*, before the judge left the bench, or within ten days after. If it was from an interlocutory sentence, or any other *gravamen*, some reasonable cause of appeal was to be alleged,² and also that his exception was not admitted; if from a definitive sentence, neither of them was necessary; but the party appealing might allege before the appellate jurisdiction such *gravamina* as he pleased, founded on matter not entered upon before the judge below; and he might produce fresh witnesses, fresh instruments, and make proof of such things as were not before proved; whereas the appellant, in the former case, was confined to the cause of appeal expressed, which was to be determined entirely on a view of the proceedings in the court below.

The cause was dismissed from the inferior to the appellate jurisdiction by *literæ dimissoriæ*, called likewise by the canonists *apostoli*. These were to be sued for by the appellant, at least within thirty days from the passing of the sentence;³ and they were to be made by the judge below, and addressed to the judge before whom the appeal was depending. If they were not obtained within that time, or within a shorter, if so appointed by the judge, the appeal was considered as deserted. If the judge refused the *apostoli*, an appeal would lie from such refusal; and if he did not appeal from the refusal, such acquiescence would be construed as a desertion of the original appeal, and the sentence would stand in force.

When the *apostoli* were granted, the appeal was to be notified to the adverse party, in order that he might appear before the new tribunal, and was to be presented within a certain term, to the judge *ad quem*, otherwise the sentence would stand in force. The term for presenting was in some cases fixed by law, and in some was prescribed

¹ Corv. Jus. Can., 270.² Ibid., 271.³ Ibid., 272.

by the judge, according to the circumstances of the cause and the parties; the judge could not prolong a legal term, though he might shorten it.¹ After the presentation was made, if the judge *ad quem* received the appeal, the appellant was to refer to the judge *a quo* the presentation, together with *compulsoriales* and inhibitions, if he required them. The compulsorials were letters sent by the judge *ad quem* to the judge *a quo*, requiring him to transmit to him, within a certain time, the proceedings in the cause, that the truth might be inquired into; which, if he neglected, he might be compelled to do by penal mandates issued from the judge *ad quem*. An inhibition was a letter issued from the judge *ad quem* to the judge *a quo*, commanding him not to do anything in the cause while the appeal depended; and whatever was done, either by the judge or party, pending the appeal, would be rescinded as null and void, the office and power of the judge being suspended, as far as concerned that cause; notwithstanding which, he might yet interfere in some particular cases. Thus, if the thing in question was in danger of being wasted by the appellant, the judge might cause it to be sequestered;² and other things might be done by the judge, if they did not prejudice the appeal. If the appellant deserted his appeal, or was adjudged to have appealed without good cause, he was condemned in the expense.³

Another way in which a cause might be submitted to a superior judge was by *relation*. This was when some difficulty arose, and the judge chose to refer it to the judgment of the pope, or some other superior authority; this was to be before definitive sentence. The grounds of the difficulty were to be set down in articles, and copies given to the parties, that any omission might be supplied by them, and submitted to the pope, or other person to whom the relation was made.⁴ A *supplication* was a substitute for an appeal in cases where the cause was determined before a judge from whom there lay no appeal, and the party had no resource but to address him by prayer and supplication.⁵ A *recusatio* might be considered in the light of an appeal: this was, when one of the parties declined the jurisdiction of the court, on suggesting some cause of suspicion against the judge. This should be made

¹ Corv. Jus. Can., 273.

² Ibid., 275.

³ Ibid., 276, 277.

⁴ Ibid., 279.

⁵ Ibid., 280.

before the *litis contestatio*, unless it arose afterwards, and then it might be made at any time, on the party swearing that it had not come to his knowledge before. Any partiality in the judge was a good cause of recusation; this, however, was to be made out within a term appointed by the judge; and if it was not done within a year, the judge might proceed in the suit.¹

Thus far of ordinary proceedings, as directed by the canon law. The extraordinary, or summary jurisdiction, according to the same law, was, as they expressed it, *non in figurâ judicii, sed ex officio judicis*, by inquisition, or denunciation, or some other course *de plano*, and upon general grounds of equity. In such case there was no tender of a solemn libel, nor was any contestation of suit necessary; the judge might proceed in times of vacation and holiday; he might refuse to admit any delay, exception, dilatory and vain appeal; he might restrain the superfluous number of witnesses; give any term he chose for the several stages of the proceeding; and might pronounce sentence even before a conclusion was duly made. Such was the proceeding that was followed in causes of election, postulation, provision, dignities, offices, prebends, tithes, matrimony, usury, and others.²

Criminal proceedings differed widely from the proceeding in civil suits. The prosecution of offenders in the canon law might be in three ways: Of proceedings in criminal suits. by *accusation*, by *inquisition*, or by *denunciation*. We shall first consider the nature of an accusation.

An accusation might be brought by all persons that were not under the following disabilities: an enemy could not accuse an enemy, nor could a person guilty of any crime. It was laid down by the canon law, that a layman could not prosecute a clerk by accusation, unless for an injury done to himself, or any one belonging to him; nor a clerk a layman, without an express protestation that it was not for thirst of blood, or punishment. Persons of low condition could not accuse clerks, unless they had before been in intimacy with them.³ Women and infants were equally debarred, unless they prosecuted for any injury done to themselves.⁴ In general, such persons were excluded from bringing an accusation

¹ Corv. Jus. Can., 277-279.

² Ibid., 286.

³ Ibid., 346.

⁴ Launc. Inst. Jur., lib. iv., tit. 1.

as were excluded by the civil law. However, these disqualifications were dispensed with in the more atrocious crimes; for in læse-majesty, in heresy, and simony, all the foregoing persons would be admitted to accuse.¹ The civil law was likewise followed in prescribing the persons who were not to be liable to an accusation; in addition to which the canonists held, that a prince might be accused of heresy, perjury, and sacrilege; with which crimes the canon law did not scruple to declare the pope himself might be charged.

An accusation ought regularly to be brought in the place where the crime was committed, unless the pope should permit it to be brought elsewhere, or the crime could be examined better in another place, or it was an accusation against a bishop, or the *reus* was apprehended in some other place. No one was admitted to bring an accusation, till he made what they called an *inscription*, or engagement, to undergo the *lex talionis*, by suffering the punishment annexed to the offence, if he failed in making out his charge. A person who made a denunciation by reason of a public office which he filled, was not bound to make this *inscription*; nor was one who accused for any inferior crime, or for apostasy.²

When the accusation was instituted, the cause proceeded by contestation of suit, exceptions, and so on, as in civil suits; unless in inferior offences, and those of læse-majesty and heresy, which were judged of *de plano*, and notorious crimes, where no other proof was wanted, and there was no need of any judicial formality to be observed. Notorious offences were such as were committed before the people, or any great assembly of persons.³ The accuser and accused ought to be present at hearing the accusation, unless in some particular cases; as where the offence was only *de injuriâ*, and either of the parties was of some illustrious rank, and the proceeding, though in form a criminal one, was for a civil redress.

The mode of prosecution by *inquisition* was when a judge, without any accuser standing forward, inquired *ex officio* whether any and what person had com-

¹ Corv. Jus. Can., 346.

² Ibid., 348.

³ Lyndwode gives us two verses from a canonist, in which the qualities of notoriety are thus expressed:—

*Quæ vel nemo negat, populo vel teste probantur,
Vel se subjiçunt oculis, notoria dicas.*—Lynd., 323 n.

mitted an offence: it was accordingly either general or special. The former was an inquiry made by a bishop, or other superintending magistrate, whether any offenders were within his diocese or district: the latter was an inquiry by them, whether a certain crime was committed by a certain person.¹ *Inquisition* might be made by the pope through his legates or delegates; by bishops in their diocese; metropolitans in their provinces; in short, by all persons having criminal jurisdiction.

Inquisition was to be made only of the more enormous crimes, as simony, adultery, fornication, perjury, incest; nor was it to be made of crimes that were concealed and not known, but only of such concerning which there had been an *infamia*, *diffamatio*, or evil report, founded upon public persuasion of the offence having been committed, and not upon the malevolent suggestions of those who took malignant pains to spread the rumor. In the case of a prelate, besides the *diffamatio* or *infamia*, there ought to be some scandal or danger, otherwise no inquisition was to be made. If a *reus* was silent (which silence was construed into a confession), he might be convicted without any preceding *infamia*, or at least any inquiry into such existing *infamia*.² All this relates to an inquisition against a particular person; for a judge might make a general inquiry without any *infamia* preceding, and thence might come to a special inquisition against a particular person. In a special inquisition, the articles of inquiry were to be exhibited to the *reus*, and also the names and declarations of the witnesses. Inquisitions were to be made by means of proper persons, and of good credit, and not through the enemies of the party, and persons guilty of perjury. To what the inquisition was to be directed, depended on the pleasure of the judge. If the party was convicted of the crime by inquisition, he did not undergo the ordinary punishment, but such a one as the judge thought proper; if the crime was not proved, then he was to submit to the canonical purgation, of which more will be said hereafter.

The third mode of prosecution, called *denunciation*, was when information was given of a concealed crime to the judge, without any of the form-

Denunciation.

¹ Corv. Jus. Can., 350.

² Ibid., 351.

ality of an accusation. The canonist divided denunciation into *evangelical*, *canonical*, and *judicial*.¹ The first was with no other view than that of amendment of the offender; as when a wife gave information to a priest of the adultery of her husband. The second was to prevent anything unlawful from taking place; as giving information that certain persons who were going to contract matrimony, were within the prohibited degrees. Judicial denunciation was either public or private: the former was done by a public officer, and always was preceded by an inquisition made by the bishop or other judge; the latter was by a private person who was concerned in interest to make it. By the canon law, all persons who had some interest in the subject might make *denunciation*, and indeed other persons, who were actuated by a zeal for the public good;² not those who were infamous, conspirators, or enemies. A denunciation used to be made without inscription; but though the informer was not bound in that manner to prove the crime, yet he was always required to take an oath of calumny, and name the witnesses who were acquainted with the offence.

It was required,³ before a denunciation against a clerk, that there should be a charitable admonition; but not in the case of laymen. The great object of denunciation was, that an offence being thus known to the judge, he should have the power of making further inquiry concerning the truth of it.⁴

If a *reus*, who was suspected of a crime, could not be convicted on proof, he was not therefore to be absolved, but was required to make out his innocence by canonical purgation. This was so called because imposed by the canons, and to distinguish it from the vulgar purgation, which consisted in the ordeal, and had been reprobated long since by the clerical law. Canonical purgation was, when a person made out his innocence by his own oath, swearing that he was not guilty, and the oaths of compurgators, swearing that they believed him to speak truth. This was to be directed by the judge who heard the cause in which he was defamed,

¹ Corv. Jus. Can., 352.

² By a provincial constitution in Lyndwode, certain persons were appointed in every diocese to be denunciators.

³ Corv. Jus. Can., 353.

⁴ Ibid., 354.

and by no other. The judge directed purgation, either at the instance of the party who was to be purged, or to satisfy himself respecting the suspicions under which the *reus* labored. The judge might, if he pleased, though he was not bound to, enjoin purgation, even where the *infamia* did not arise from very probable conjectures.

Purgation was not to be enjoined but where the *reus* was a credible person, who, though under suspicions, would not be thought very ready to perjure himself; and it was only to be where the party was not convicted, either by legal proof or his own confession; where the crime was not notorious, but yet he was defamed among good men upon probable suspicions. The judge was to choose the compurgators from persons of honest character, neighbors of the *reus*, and well acquainted with his life and conversation. They were to be sometimes twelve, sometimes seven, sometimes more and sometimes less, according to his discretion, considering the circumstances, the nature of the offence, and the quality of the *reus* and compurgators. The purgation was to be made where the defamation was: thus if he was defamed by the people, it was to be before the people; if among clerks, before clerks; and the like. If he succeeded in his purgation, he was liberated from the charge; if he failed, he was punished the same as if he was convicted, or had confessed.¹

It appears unnecessary in this place to bring back to the reader's recollection the conduct of criminal prosecutions in our own law, as mentioned in the earlier parts of this history. The similarity between those and these we have just been relating, is too strong to need being pointed out. We now see, that not only purgation is a piece of law entirely canonical, but that the proceeding *per famam patriæ*, from whence was derived the presentment of jurors, may be found elsewhere than in our municipal customs; and that, according to the accounts of our earliest writers, it was first practised among us upon ideas and principles purely canonical.²

¹ Corv. Jus. Can., 378-380.

² It may be here remarked, that supposing this proceeding to have been formed with an eye to the canon law, our conjecture about the offender's innocence being determined by the same persons who suggested the *infamia*, or at most by purgation, without resorting to another jury, is justified by the account given above of *inquisitions*.

The punishments which the ecclesiastical court could inflict were all of a spiritual kind; they consisted either in penance, excommunication, interdict, suspension, removal, or degradation. Some of these censures require a little further consideration.

Excommunication was divided into what they called the *greater* and the *less*. The latter only removed the person from a participation of the sacraments, and is what was more commonly meant by excommunication: the other was called *anathema*, and not only removed the party from the sacraments, but from the church, and all communion with the faithful. Excommunication sometimes followed *ipso facto* upon the commission of an offence: this was called *canonical*, to distinguish it from that which did not depend upon any established canon, but upon the passing of sentence by a judge.¹

The following offenders were *ipso facto* punished with the greater excommunication: all diviners and *sortilegi*; heretics, their receivers and comforters; simoniacs; violators and plunderers of churches; those who spoiled clerks going to Rome; the plunderers of the property of a bishop which ought to go to his successor; those who gave aid, favor, or counsel to excommunicated persons; those who laid violent hands on clerks or religious persons, or commanded any so to do.² The following offenders were *ipso facto* punished with the less excommunication: all persons committing any mortal sin, as sacrilegious persons; those who received a church from lay hands; notorious offenders; those who talked with, saluted, or sat at the same table with, or gave anything in charity to, persons excommunicated by the greater excommunication, unless they were familiars or domestics.³

The greater excommunication could be inflicted only by one having criminal jurisdiction; the less might be imposed by any clerk having the cure of souls. Excommunication was a censure that could pass only against the living, except in the case of heresy, which might be prosecuted after the death of the party. It could not, from the nature of it, be passed against pagans, who constituted no part of the church.⁴

¹ Corv. Jus. Can., 359.

² Ibid., 360.

³ Ibid., 361.

⁴ Ibid., 363.

A sentence of excommunication was to be preceded by three monitions at the due intervals, or one peremptory, containing the legal space of time, with a proper regard to the quality of the person and the nature of the business. The judicial course also ought to be observed, though the excommunication would hold without it, but not without the monition; and the judge who passed sentence of excommunication without it would be prohibited for a month *ab ingressu ecclesiæ*; and if proper, be subject to other penalties.¹ A sentence of excommunication might pass absolutely or conditionally; as, "Unless you satisfy Sempronius within twenty days, I excommunicate you." The sentence was to be put into writing, containing the cause thereof, and the name of the party.² An excommunication might be taken off in several ways.

It might be revoked by the judge who passed the sentence. Upon appeal, the judge *ad quem* might absolve the party, or send him to a judge *a quo* to absolve him. Absolution belonged to the same person who passed the sentence, unless in some particular cases that were referred to the pope or a bishop.³ Absolution in some cases used not to be given till security was entered into by the party for making satisfaction.⁴

An *interdict* was an ecclesiastical censure, by which a certain place or certain persons were interdicted from the participation of divine rites, sepulture, and the sacraments, till the commands of the church were obeyed. This, like excommunication, was either *ipso facto* by the precise direction of the law, or by sentence of the judge. Of the former kind was such as was denounced against a community or city which did not expel usurers, or which permitted reprisals against ecclesiastical persons, or did not make them good within a month; a lord who would not admit a legate or apostolic messenger within his territory; a church polluted⁵ with human blood, or consecrated simoniacally.

A sentence of interdict might be passed by all who could pass sentence of excommunication; an ordinary, delegate, bishop, provincial synod. An interdict, if for contumacy, should be preceded by monition; but this was

¹ Corv. Jus. Can., 364.

² Ibid.

³ Ibid., 367, 368.

⁴ Ibid., 369.

⁵ Ibid., 371.

not necessary, if for an offence.¹ An interdict, if issued against a people by the term *populus*, was construed not to include the clergy. During an interdict, in early times, none of the ecclesiastical offices could be celebrated, nor any of the sacraments, except the baptism of infants, and the penitence of dying persons.² This was in subsequent times relaxed; and baptism and confirmation were allowed to all; penitence and the eucharist to the dying; but not extreme unction to the laity, though it was to the clergy: at length they allowed mass and other divine ceremonies to be performed once a week, in some few churches and monasteries, with a low voice, and the doors shut, without ringing of bells; and afterwards they allowed it in all churches, every day, though with the observance of the other restrictions; which, however, need not be adhered to on certain great festivals of the year. Persons who did not obey such interdict would be deposed, and rendered incapable of taking a benefice.³ An interdict might be confined to certain persons, or to a certain place; it might be removed by absolution, as excommunication was.

Suspension was an ecclesiastical censure, by which a spiritual person was interdicted from the exercise of his office, or order, or both; entirely, or in part, for a time, or *in perpetuum*. This, like the two former, was either *ipso facto*, and canonical, or imposed by the sentence of a judge.⁴ *Remotion*, or *deposition* (which is the last ecclesiastical censure we have to mention) like the former, only related to ecclesiastical persons, who might thus be deposed, either from their dignity, order, or degree: deposition was only by sentence, and the sentence of a bishop.⁵ *Degradation*, sometimes called *solemn deposition*, was the solemn detraction of the higher orders. The solemnity was this: If an abbot was to be degraded, it was to be in the presence of abbots; if a presbyter, of six bishops; and also in the presence of the secular judge, to whom he was to be delivered when degraded. In the presence of these parties, the bishop was to shave the head of the *reus*; then he was to scrape with glass or iron those parts of the head and hands which were anointed at the time of his ordination; after this, he was to take off, in

¹ Corv. Jus. Can., 372.

³ Ibid., 374.

⁵ Ibid., 376.

² Ibid., 373.

⁴ Ibid., 375.

an order entirely reversed from that in which it was put on, his clerical habit. When this was performed, the party became, to all purposes, a layman; and being thus deprived of all his clerical privilege, was delivered over to the secular court, to be punished by the secular laws. This punishment of degradation was inflicted only in three cases; in case of a heretic, of a falsifier of the pope's letters, and of one who had practised against, or any ways calumniated, his bishop.¹

¹ Corv. Jus. Can., 377, 378.

CHAPTER XXVI.

EDWARD IV.

OF ECCLESIASTICAL JURISDICTION — OF MATRIMONY — ESPOUSALS — NUPTE — OF COGNATION — CONSANGUINITY — AFFINITY — OF DIVORCE — JACTITATION OF MARRIAGE — OF WILLS AND TESTAMENTS — EXECUTORS — OF THE FORMS OF WILLS, ETC. — OF PROBATE — OF INTESTACY — OF PIOUS USES — THE RATIONABILIS PARS — TITHES — SYLVA CÆDUA — COMPOSITION FOR TITHES — SPOILIATION — SUITS DE LÆSIONE FIDEI — DEFAMATION — PROHIBITIONS — PROVINCIAL CONSTITUTIONS — KING AND GOVERNMENT — THE STATUTES — FORTESCUE — LITTLETON — LYNDWODE — REPORTS AND LAW-BOOKS — MISCELLANEOUS FACTS.

SUCH was the juridical system which the Roman canonists had been laboring so many years, with such perseverance and energy, to establish in our ecclesiastical courts; and notwithstanding they were, as we have seen, in some instances, disappointed of their object, they succeeded in gaining prescription for more than seven parts in ten of the pontifical law, which, under control of the temporal judges, became the prevailing rule of decision in the ecclesiastical courts. It is now our business to inquire more particularly what was the extent of this jurisdiction, what objects it embraced, and in what manner it treated them. This has been slightly touched in the reign of Henry III.;¹ but so much time had elapsed, and such controversy had since happened upon questions of judicature between the clerical and temporal courts, that the subject is still open to further illustration; and it will be curious to see how the law of ancient times is either corroborated, new modelled, or altered by later opinions.

Of the objects which the canonists claimed as belonging to their jurisdiction, our temporal courts had long appropriated to themselves to decide exclusively upon rights of patronage, and upon all crimes affecting life and limb. *Freehold* and *chattels* were two other descriptions that marked many articles of judicature

¹ *Vide* vol. ii., c. v.; and c. vii.

as subject solely to the decision of the common-law courts. On the other hand, the judges seem to have given themselves no concern as to the mode in which the ecclesiastical court proceeded with causes that were left to their determination. The spiritual tribunal was permitted, undisturbed, to enjoy the privilege assumed by all courts, of forming its own course of proceeding; and it accordingly adopted, without any material variation, the practice of the canon law mentioned in the foregoing chapter. Without, therefore, entering any further into the nature of judicial proceedings, we shall briefly recapitulate the several objects upon which they might be employed; most of which have been frequently mentioned in the former parts of our history, either from Bracton, or the famous constitution of Boniface, in the reign of Henry III., the statutes of *circumspectè agatis*, or *articuli cleri*, or on some other of the many occasions when the jurisdictions of the temporal and clerical court came into competition.¹

The two grand descriptions of causes which seemed more indisputably than any others within the cognizance of this tribunal, were *matrimonial* and *testamentary*, and their incidents. Under testamentary were included last wills, codicils, legacies, administration and sequestration, commonly called letters *ad collegendum*. Under matrimonial were included divorce; jactitation of marriage; questions of legitimation and bastardy; suits for restitution of a man's wife taken away; suits to compel a man to receive his wife again; and suits for goods promised with a woman in marriage. These were the principal and more important objects of jurisdiction; the remainder, which may with our canonists be considered as *reliqua jura ecclesiastica*, were classed in the following way:

First, some duty arising upon the exercise of voluntary jurisdiction, and by denial made litigious; such as *real compositions*, when attempted by some persons to be annulled; procurations, pensions, indemnities, fees for probates, and the like; or secondly, such demands as became due only upon exercise of litigious jurisdiction; as fees of court, fees to advocates, proctors, apparitors, and the like; or thirdly, such as were due to a minister in the church who had no title; as a salary to a curate or a

¹ *Vide* vol. ii., c. viii., x., and xi.

clerk; or fourthly, to a minister who had a title; and then it was either something incident to him, as to name a parish-clerk, or concerning the whole title and interest of his benefice; for though the right of patronage was cognizable only in the temporal court, yet the avoidance or spoliation belonged to the court Christian. Next follow the dues that concern a minister's maintenance; as tithes, oblations, obventions, pensions, mortuaries, church-yards, or places of burial; and lastly, such things as are due to a whole parish; as to have a chaplain found, or divine service performed, or sacraments administered amongst them, or anything due to their church; or for a parishioner to be contributory with the rest to reparation of the church, for seats, bells, books, utensils, and other ornaments or necessities for the church. Thus far of those things that were objects of jurisdiction in consideration of their being *jura ecclesiastica*.

The crimes and offences punishable by the court Christian, were divided into such as were contrary either to piety, justice, or sobriety. Of the first class were blasphemy, swearing, idolatry, heresy, error in faith, schism, apostasy, not frequenting public prayer, neglect of the sacraments, perjury in an ecclesiastical court or matter, disturbance of divine service, violating and profaning the Sabbath. Of the second were simony, usury, defamation, subornation of perjury in a court ecclesiastical, violence to a minister, sacrilege, dilapidations, not building of a church as enjoined by a testator, not fencing a church-yard, not repairing a church or chancel, or not keeping it in good repair; a church-warden refusing to give an account of the church stock and goods; the violating of a sequestration made for tithes not paid; hindering to gather or carry tithes; money promised for redeeming corporal penance; contempt of the ecclesiastical jurisdiction; the violation of churches and church-yards. Of the last class were all incontinence not made capital by the common law, whether it was incest, adultery, *stuprum* or simple fornication, polygamy, the solicitation of a woman's chastity, drunkenness, filthy speech, or the like irregularities.¹

The objects of clerical jurisdiction, when thus enumerated and placed in array, make a very formidable ap-

¹ *Vide* An Apologie of certaine Proceedings in Courts Ecclesiasticall, printed in the reign of Queen Elizabeth, part i., page 18.

pearance; and when we reflect that many spiritual offences were the consequences of habit and constitution; that the censures inflicted on such offenders might be commuted for money, payable to the judge himself; and that there was such a judge in every diocese to enforce the execution of the law; it must be confessed, that the ecclesiastical maintained against the temporal power a divided empire, which, if not so extensive, was more vigilant, more oppressive, and more odious to persons of both sexes, and of every rank and age in the kingdom; and was capable of producing great good or great evil.¹

¹ Our old English bard has given us a very spirited comment upon the practice of the spiritual court, which, if it is not overcharged, deserves all the credit of a contemporary exposition of the conduct and manners of its retainers. In the *Canterbury Tales*, Chaucer introduces a Friar, and a Sumpnour, or Apparitor, who used to serve the *summons* and citations of the bishop's court. The latter had shown a violent disposition to quarrel with the former, which the Friar attributes to his fraternity being exempt from the jurisdiction of the bishop, and so not liable to be pillaged by the Sumpnour's extortion. This, perhaps, might be the true cause, and it accordingly drew more ill language upon the poor Friar; who, when it came to his turn, revenged himself by telling a malicious story of a Sumpnour. He begins with an account which seems to describe the jurisdiction of the spiritual court very fully.

Whilom ther was dwelling in my contree
An archedeken, a man of high degree,
That boldely did execution
In punishing of fornication,
Of witchecraft, and eke of bauderie,
Of defamation, and avouterie;
Of chirche-reves, and of testaments,
Of contracts, and of lack of sacraments;
Of usure, and of simonie also;
But certes lechours did he gretest wo;
They shulden singen, if that they were hent,
And smale titheres weren foule yshent:
If any persone wold upon hem plaine,
Ther might astert hem no pecunial peine.
For smale tithes, and smale offering;
He made the peple pitously to sing;
For er the bishop hent hem with his crook,
They weren in the archedeken's book;
Then said he, thurgh his jurisdiction,
Power to don on hem correction.*

Of all these points of judicature, none was so fruitful to the court as that of incontinence; this was a weed to be found in most soils, and the Sumpnour was always hunting for it. The Friar tells us,

A Sumpnour is a renner up and down
With mandements for fornicatioun,
And is ybete at every tounes ende.

The Friar makes the supposed Sumpnour's diligence to be mostly engaged

* [And no doubt naturally enough the people, against whom this power was exercised, did not like it, and there is reason to believe that the poet at one period of life was of that class. Still there can be no doubt that it was a jurisdiction exceedingly vexatious and obnoxious, and liable to the grossest abuse, of which, perhaps, the above may be taken as an exaggerated though not entirely untrue account.]

In order to obtain a more clear idea of the clerical judicature, we shall now take a nearer view of the different

on this part of his employment. After the above account of the archdeacon and his court, he goes on thus:—

He had a Sumpnour ready to his hond,
A slier boy was non in Englehoond.

To go on with the Friar's tale, who brings the Sumpnour into conversation with a bailiff:—

Brother, quod he, here wonneth an old Rebekke,
That had almost as lefe to lese hir nekke,
As for to yeve a peny of hire good.
I wol have twelve pens though that she be wood
Or I wol somone hire to our office;
And yet, God wot, of hire know I no vice.

He then describes him as knocking at the woman's door, and entering upon the execution of his office, in the following manner:—

I have, quod he, of somons here a bill
Up peine of cursing, loke that thou be
To-morwe before the archedeken's knee,
To answe're to the court of certain things.

May I not axe a libel, Sire Sumpnour,
And answe're ther by my procuratour,
To swiche thing as men wold apposen me?
Yes, quod this Sumpnour, pay anon, let see,
Twelf pens to me, and I wol thee acquite,
I shall no profit han thereby but lite;
My maister hath the profit, and not I;
Come of, and let me ridden hastily;
Yeve me twelf pens, I may no langer tarie.

The sequel of the tale is not to our purpose, except that the woman being unable to pay the money, the Sumpnour is represented as pretending to have compounded at the office former irregularities committed by her, and that she had never reimbursed him. To indemnify himself, therefore, for both demands at once, he is made to seize on a piece of her furniture.

This vindictive tale sets the officers of the spiritual court in a very disgraceful light, and reflects some scandal on the court itself. Making allowance for exaggerations, we may, however, collect from this and other notices, that the officers of the bishop were perhaps as numerous, as well known, and as much regarded as those of the sheriff; that irregularities of conduct, if known, were as constantly corrected as the depredations of robbers; and that the power and jurisdiction of this tribunal was, therefore, continually before the eyes of the people. Such considerations as these can alone account for the great heat with which questions of judicature were contested on both sides. When the reformation of religion had lowered the pretensions of the clergy, and altered the sentiments of the people respecting ecclesiastical authority, the bishop's court exercised its jurisdiction with great tenderness and scruple, till at length it sunk into neglect, and almost into oblivion. [There can be no doubt that the dislike to its jurisdiction, and the obvious character of its constant interference with the daily affairs of life, led more than anything to the change which took place at the Reformation; and Reeves puts as the *result* of that change what was one of its chief causes. M. Froude, in his *History of England*, draws a vivid picture of the exercise of this ecclesiastical jurisdiction. At the same time, it must be borne in mind that it was not only the Roman Catholic Church that exercised this kind of inquisitorial jurisdiction over private life and personal morality. It was equally exercised by the Calvinistic clergy in Scotland or in Switzerland; and Mr. Buckle draws an equally vivid picture of its exercise there. So of the Pilgrim Fathers in America; their control over private life was exceedingly strict and severe.]

objects of its jurisdiction, beginning with causes matrimonial and testamentary, and then proceeding to tithes, and the others before enumerated.

Of all articles of judicial cognizance which the ecclesiastical court claimed exclusively to entertain, ^{Of matrimony.} that of *matrimony* seems to have been the least controverted by the temporal judges. When marriage was admitted by the religion of the country to be a Christian sacrament, the jurisdiction of spiritual judges could not well be disputed. We accordingly find no parliamentary interposition on this head, but the ecclesiastical court was left to decide in matrimonial causes upon the pure principles of canonical jurisprudence.

Matrimony was defined by the canonists in this manner:

Viri et mulieris conjunctio, individuan vitæ consuetudinem, cum divini et humani juris communicatione, continens. ^{Espousals.} This union of man and wife was preceded by *sponsalia*, or espousals, the nature of which must be first considered, before we come to speak of matrimony. Espousals were the promise of a marriage that was to take place, and were divided into espousals *de præsentī*, and espousals *de futuro*. Those of the former kind were considered in the same light as matrimony; so that espousals, properly so called, were the latter; which were, when a promise of a future marriage was made by words of a future signification; as, “I will take you to wife.” Such espousals might be *nuda et simplicia*, or *firmata*, as the canonists called them: the former was where a mere promise was made; the latter was where some earnest or pledge preceded, as a ring given, or oath taken. Espousals must be contracted by consent, whether expressed in words or by some sign; as that of a ring, a gift, a kiss, or embrace; by a letter, messenger or procurator. A ring, to answer this purpose, must always be accompanied with some signs to express both that it was given and received by way of espousals; and any doubt on this point was to be determined by the ecclesiastical judge.

All persons who had completed their seventh year, were held competent to contract espousals; and espousals contracted even before that age, might be ratified by a regular consent. It was no impediment that a person was deaf and dumb, provided he had his intellects, and could express his mind by signs. Espousals might also be con-

tracted by third persons for the party; as by a father for a son, a mother for a daughter, an uncle for a nephew, by tutors and curators for their pupils. But these had no legal effect, unless the party when of age of puberty signified his consent; which in case of a promise by a father might be a tacit consent, but in other cases must be express: if the party was present, and preserved a silence, it was held to be a tacit assent. Espousals were made either *purè*, or with appointment of a day, or *sub conditione*. If the promise contained neither of the latter qualifications, it was said to be made *purè*. A promise on condition made the performance of it depend on some event, and till that took place it had no effect; unless a *carnalis copula* intervened, or the condition was such as the law pronounced to be *turpis*.

Espousals, when once contracted, so bound the parties, that they could not retract, but each had a *jus matrimonii*, so as to be able to institute a suit for the ecclesiastical judge by censures to compel the other party to consummate the marriage. Indeed, if a *carnalis copula* succeeded, the marriage was completed without more ceremony; for notwithstanding the maxim, that *non concubitus sed consensus facit matrimonium*, the church presumed that by such act the party meant to perform his promise, rather than commit the sin of fornication. This was a presumption which did not admit any proof to the contrary, and it could be done away only by showing that the espousals had before been legally dissolved, or were in themselves null and void. If there were more than one espousals, the former were preferred, even though the latter had been sanctioned by an oath; unless indeed a *carnalis copula* had taken place. The effect of espousals was to create such relationship that the *consanguinei* of the *sponsus*, or man espoused, could not, upon his death, or the dissolution of the espousals, marry with the *sponsa*, nor *vice versâ*.

Many were the causes which were held by the canonists sufficient to dissolve espousals. They might be dissolved by mutual consent, even though sanctioned by an oath; by absolution of the judge; by other espousals confirmed by a *carnalis copula*; by affinity supervening, though by an illicit *copula*; by entry into religion; by fornication, whether corporal or spiritual, as if either party fell into heresy or idolatry; by lapse of time, as if they had let

the day mentioned in the contract pass; or, if no day was fixed, an absence of three years; for if a person was absent such a length of time without sufficient cause, the other party might contract afresh; by failure in performing a condition, if any was annexed; by report of a canonical impediment; by *capitales inimicitie* happening between the persons espoused; by asperity of manners in either party; by deformity, or any contagious disorder; in all which cases other espousals might be contracted, without the authority of the judge, if the cause was notorious in point of fact, and likewise plain in point of law; if not notorious, then by the sentence of a judge.¹

Espousals *de præsenti*, as was before said, were in effect a contract of marriage celebrated *per verba de præsenti*. The definition of *matrimonium* or *Nuptiæ* was given before: upon that definition it is sufficient to remark, that the words *divini humaniq; juris communicationem*, expressed that the parties should be of the same religion. Christians, by the canon law, could not contract matrimony with Pagans, Jews, or Turks, under pain of excommunication. Matrimony was considered in various lights: first, it was public or clandestine: the former was celebrated in the presence of witnesses with all the due solemnities; the latter was without either. Again, matrimony was divided into *legitimum et non ratum*, and *ratum et non legitimum*, and *legitimum et ratum*.

A marriage was said to be *legitimum et non ratum*, if it was celebrated between Jews and infidels, and it was called *non ratum*, because it might be dissolved by repudiation; whereas marriage among Christians was indissoluble, and was therefore called *ratum*; so that a marriage *ratum et non legitimum* was such as was among Christians, without the canonical solemnities; that which was *ratum et legitimum* was a marriage among Christians, attended with all the due canonical solemnities. This is the marriage which it is our business to consider.

For a marriage to be contracted in a legitimate way, it was necessary to have the consent not only of the parties, but of the parents, if they had any; and if there was any force, or fear, or error, these were circumstances that vitiated a marriage, and rendered it void. The *metus* was such

¹ Corv. Jus. Can., 79 to 84. Launc. Inst. Jur. Can., lib. ii., tit. 9, 10.

as *in constantem virum vel fœminam potest cadere*; and the error was to be concerning something necessary to the marriage, as the identity of the person, and not his quality or fortune. There were other impediments to matrimony than these three, and these impediments were divided into such as impeded the contract of marriage, and, if completed, dissolved it; and those which impeded, but did not dissolve, the contract. Of the former kind were force, fear, and error, which have just been mentioned; to which the canonists added, *cognatio, justitia publicæ honestatis, votum solemne, ordo, crimen, coeundi impotentia, cultûs disparitas*.

The impediment of *cognation* was that upon which the canonists had employed great attention; and by various subtleties they had extended it to such unexpected consequences, that the compass within which marriage might be contracted was by these means greatly narrowed.

They divided *cognation* into *spiritual, carnal, and legal*. Spiritual was such as arose from baptism or confirmation. Thus there was a *compaternitas* between the spiritual father who baptized, the sponsor for the child,¹ and the father of it; and a *paternitas* between the person baptizing and the child baptized, the sponsor and the child. There was in like manner a *fraternitas* between the children of the person baptizing, or of the sponsor, and the child baptized; and such cognation in either of these instances was an impediment which would both obstruct marriage, and dissolve it, if contracted. The canonists, however, had guarded against one probable consequence of this cognation; for if the father or mother of the child should happen to be sponsors, this was not held to be a cause of separation, though it was an irregularity that constituted a spiritual offence.²

The *cognatio carnalis* arose either from consanguinity or affinity. Consanguinity, which was sometimes signified by the general appellation of *cognation*, is defined by the canonists to be, *vinculum personarum ab*

¹ *Qui puerum suscipit de fonte*; this was done by the *sponsor*, or godfather.

² The Council of Trent made an alteration in this point of spiritual cognation; for it was there decreed that the prohibition of marriage was only to be between the child and its father and mother and the sponsor; and between the person confirming and the confirmed, and its father and mother; and the person *holding it* at the time of confirmation; without extending to the descendants in either case. Corv. Jus. Can., 90, 91.

eodem stipite descendendum, vel ascendendum, carnali propagatione in matrimonio, vel extra illud, contractum. There are three considerations relating to this point, which are the *stipes*, *linea*, and *gradus*. The *stipes* was the stock from which the persons, whose relationship was in question, descended; and this was never computed as a degree. *Linea* was defined to be *collectio personarum ab eodem stipite descendendum, diversos continens gradus, et numeros distinguens*. It was either the *right line superior*, containing the ascendants; or *inferior*, containing the descendants; or *transverse*, which was between the brothers and other *cognati*.

The transverse line was either *equal*, which was when the *cognati* were equally distant from the *stipes*; or *unequal*, which was when they were not. Thus brothers were in an equal line, because, both were distant in the same degree from the father: the brother and brother's son were in an unequal line, because the brother was distant from the father in the first degree, but the brother's son in the second. A *gradus*, or degree, is defined, *habitus distantium personarum quâ propinquitatis distantia inter personas duas vel diversas discernitur*. The canon law, as it considered the degrees with a view to marriage, which subsisted by the consent of two parties, for that reason always joined two persons in reckoning them. This was done differently in the right line, and in the transverse line; for in the right line, whether superior or inferior, it was a rule, *quot generationes numerantur, tot numerantur gradus, dempto stipite*: thus every person, whether ascending or descending, added a degree. In the transverse line, if equal, the rule was, *quoto gradu unusquisq; eorum distat à stipite, eodem distant inter se*. Thus, *patruales* and *consobrini* are distant in the second degree from the common stock, and therefore, by the canon law, were deemed in the same degree from each other; so that two degrees, as reckoned in the civil law, constitute only one in the canon law. In the *transverse unequal line* the rule was *quoto gradu remotior distat à stipite, eodem distant inter se*: thus the brother's son was distant in the second degree from the uncle, because he was distant from the grandfather, the common stock, in the second degree.

Thus stood the law of consanguinity, according to the computation of the canonists; and the manner in which they applied it to the subject of marriage was this: in the right line, whether ascending or descending, all marriage

was prohibited *in infinitum*, and such as were contracted would be dissolved. In the transverse line, marriage was formerly prohibited as far as the seventh degree, and lately to the fourth degree only inclusive:¹ however, they held that such prohibited marriages contracted between infidels, who were afterwards converted, should not be dissolved.

Thus much of consanguinity: affinity, the other branch of cognation, was defined to be, *personarum necessitudo, ex coitu proveniens*, whether lawful or unlawful. Affinity, however, did not extend to the *affines* of the married person, nor to the *cognati* of the man and woman between themselves. The degrees of affinity were calculated by the same rule as those of consanguinity; for as man and wife were one flesh, so in whatsoever degree of consanguinity Titius or Titia stand to me, in the same degree of affinity would stand the husband of the one or the wife of the other. Affinity was of three kinds. The first kind of affinity was contracted by one person, the second by two, and the third by three. For example, my brother is my *consanguineus*, his wife Mævia is related to me in the first kind of affinity; if my brother died, and Mævia married Titius, he would be related to me in the second kind; and if Mævia died, and Titius married another wife, she would be related in the third kind of affinity. The wives or husbands of two who were related by consanguinity, were related to each other by an affinity of the second kind. In short, the husband or wife of one related to me by consanguinity, is related to me by an affinity of the first kind; the husband or wife of such relation in the first kind of affinity, is related to me in the second; and the husband or wife of a person related to me in the second kind, is related to me in the third kind of affinity.

The manner in which this law of affinity was applied to marriage, was this: in like manner as marriage between *consanguinei*, in the ascending or descending line, was prohibited *in infinitum*; it was equally so among those related by affinity, because they were considered *in loco*

¹ There seems to have been some ambiguity as to the degrees prohibited in England. By a constitution of Archbishop Lanfranc, no marriage was to be allowed within the seventh degree; and yet we find that stat. 32 Hen. VIII., c. 38, speaks of the prohibition as confined to the fourth or fifth degree.

parentum et liberorum; so that no marriage could take place between me and the *consanguinei* of my wife in the right line. The same prohibition extended to those in the transverse line, as far as the seventh degree in the first kind of affinity; to the fourth degree, in the second kind; and to the second degree, in the third kind. It must be remarked, that the affinity to impede marriage, must be such as subsisted before the marriage, and not such as might afterwards supervene. Such subsequent affinity would neither dissolve a marriage, nor espousals *de presenti*, though it would espousals *de futuro*.

All these impediments, whether from consanguinity or affinity, might be dispensed by the pope, upon showing some true and lawful cause for such dispensation. But even on this prerogative of the sovereign pontiff the canonist had imposed some restrictions; for it was held, that he could grant no dispensation to make a marriage lawful, if the impediment was in the right line; but only in the collateral, and in that, too, not nearer than the second degree. For, say the canonists, the pope in the plenitude of his power could dispense with the law only where he violated neither the articles of faith, nor the general state of the church.

The last sort of cognation, called *cognatio legalis*, is defined to be, *personarum proximitas ex adoptione vel arrogatione solemnî ritu factâ proveniens*. This both impeded and dissolved matrimony between ascendants or descendants, not only during the adoption, but even if it was at end; in the transverse line, only while the adoption subsisted. But the law of adoption never having prevailed in this country, no impediment could arise to marriage on this consideration. Thus far of cognation in all its parts.

The next impediment was what the canonists termed *justitia publicæ honestatis*; and this they defined, *propinquitas ex sponsalibus proveniens, robur ex institutione ecclesiæ trahens propter ejusdem ecclesiæ honestatem*. This both impeded and dissolved marriage; and it extended to the fourth degree. The *votum castitatis solemnne*, and *ordo sacer*, are impediments that need no particular observation. The *crimen adulteri* became an impediment in this manner. If any one, during the life of his wife, contracted matrimony or espousals with another, and a *carnalis copula* ensued, and the woman knew he had another wife, such marriage could not after-

wards be established even by the death of the first wife: but if she was ignorant of his having another wife, and no *carnalis copula* had taken place, the marriage might be contracted after the death of the first wife. *Impotentia*, if natural, would both impede and dissolve marriage; and so, if accidental, and before the marriage; but if the accident happened after the marriage, it had not that legal consequence.

Other impediments there were, which only impeded, but did not dissolve, marriage. These were *furor*, *interdictum*, *feriæ*, *catechismus*, *votum simplex*, *crimen*. A person who was mad, might, however, during a lucid interval, contract marriage. The *feriæ*, within which marriage could not be celebrated, were from Advent to Epiphany; from Septuagesima to the octave of Easter; and from the first Rogation-day to the octave of Pentecost. Catechism was considered as an impediment, on account of the spiritual cognation which was supposed to be thereby created.

The crimes which impeded, but did not dissolve, marriage were these: *incestus*, *uxoricidium*, *raptus*, *susceptio proprii filii de fonte*, *presbytericidium*, *pœnitentia solemnis*. The manner in which incest was an impediment, is thus explained by the canonists: If a person committed incest with a person in consanguinity with his wife, and of course in affinity with him, this fact made him assume an affinity with his wife, so as to disable him from claiming the conjugal rites during her life, and, when she died, from contracting matrimony. The impediment from receiving his own child from the font, was, in like manner, that he could not demand of his wife the conjugal rites. A person who killed his wife (and so also a wife who killed her husband), or one who killed a presbyter, or who had incurred the punishment of any solemn penance, could not contract matrimony. It was required by the canons, that a marriage should be celebrated publicly in the face of the church, or in some assembly of the faithful, representing the church; and the parish priest, or some one by his permission, was to pronounce his benediction.¹

We shall now add a few words on *clandestine* marriages. These were so called if contracted without witnesses, and, as it were, by stealth, without any of the solemnities

¹ Corv. Jus. Can., 85 to 102. Launc. Inst. Jur. Can., lib. ii., tit. 11-13.

requisite to the celebration of all lawful marriages. The requisite solemnities were, that the marriage should be propounded by the priest, who was to fix a time, within which those who knew any impediment should declare it. The priest, in the meantime, was likewise to examine if there was any impediment, under pain of suspension for three years if he neglected so to do. The consequence of such clandestine marriage was, that the children were all illegitimate: however, the marriage might be made good, and the children legitimated, if it was afterwards approved by the church, or published by the parties.¹ The abuse of clandestine marriages was very early noticed by our provincial synods. It was required by one of our constitutions, that banns of marriage should be previously published, and that no marriage should be celebrated but in a parish church, or chapel having parochial rights, unless with special license of the bishop; and any priest assisting at a marriage not so celebrated, was subjected to the penalty of suspension.²

The canonists reckon, among others, the effects and consequences of matrimony to be these: that the children born afterwards either are legitimate, or become so. Of the former sort are those born during the marriage; of the latter,³ are those born before the marriage, if the parents, at the time, were capable of contracting matrimony; secondly, that they were to cohabit; thirdly, that no simple *donatio inter virum et uxorem* could regularly hold.⁴

The next point to be considered is *divorce*. This was defined to be, *legitima mariti et uxoris separatio, apud competentem judicem, cum causæ cognitione, et sufficiente ejus probatione factâ*. Of divorce. It was either *tori*, or *vinculi matrimonialis*. In the first instance, there was an interdiction from any cohabitation, or mutual conversation, either for a time, or generally without any mention of time; in the latter, the marriage was entirely dissolved forever. The causes of divorce of the former kind were, *propter adulterium, propter furorem, propter hæresin, propter sævitiam*. With respect to adultery it was held, that if both parties were equally guilty, or the husband prostituted the wife, or the husband was reconciled to his

¹ Corv. Jus. Can., 102, 103. Launc. Inst. Jur. Can., lib. ii., tit. 14.

² Lynd., 273, 274, 277.

³ *Vide* vol. i.

⁴ Corv. Jus. Can., 104, 106.

wife after her guilt, it was no cause of divorce. The only cause of divorce, *vinculi matrimonialis*, as laid down by the pious canonists, was *propter infidelitatem*, which was when one of the parties became Catholic, and would not live with the other, who continued still an unbeliever. But this, though the only cause of divorce *à vinculo*, was not the only ground upon which a marriage might be dissolved, for we have just been enumerating many impediments which entirely dissolved the marriage. In case of a divorce *quoad vinculum*, the parties were at liberty to marry; but a divorce *à toro* had no such effect, the parties still continuing man and wife. If either party, without a cause of divorce, or the judge's authority, declined the conjugal state, he or she might be compelled by an action *ad matrimonium colendum*. If a woman, upon a just cause of complaint of the husband's severity, but without a regular divorce, departed from him, she would be restored to her husband, if he demanded her, provided he gave security for treating her well; but no restitution would be made, if the severity was such as could not easily be guarded against by any security; and, in such case, she would be committed to the custody of some discreet woman till the decision of the cause.

The canon law put a mark of disapprobation upon *nuptiæ secundæ*; for so they termed every marriage after the first, no benediction could be pronounced, nor could any priest be present at the celebration of them.¹ Bigamy was such a stigma upon a man, as to disqualify him for receiving orders, even though his wife was dead; nor could it be removed by any dispensation. But the canonists carried the construction of bigamy beyond the contracting of a second marriage. If a man carnally knew a woman who committed adultery, if he married a woman repudiated, or a widow, he was considered as a bigamist, and disqualified for orders. It was held, that a person marrying a woman, who was married to another, but not carnally known by such stranger, was not a bigamist; nor one who had had many concubines, if he had undergone penance, and had been dispensed with. The latter therefore was not considered such an *irregularity* (for so bigamy was termed) as to render a person unfit for the

¹ Corv. Jus. Can., 108-110. Launc. Inst. Jur. Can., lib. ii., tit. 16.

duties of the church.¹ The credit that was given by our courts of common law to the bishop's certificate in cases of bastardy and bigamy, has been too often mentioned to need being enlarged upon in this place.²

Such was the law of marriage, as delivered by the canonists, and adopted by our ecclesiastical courts for their rule in deciding upon matrimonial causes. To these it will be necessary to add some points of a juridical nature relating to marriage, which were peculiar to our own law, and occasionally had been agitated both in our lay and spiritual courts. In our spiritual courts we find a suit spoken of by writers of the next period, called *jactitation of marriage*, and which prob- Jactitation of marriage. ably existed at the time of which we are now writing. This was a proceeding to clear a person of a matrimonial contract, which was pretended to exist by the other party. A suit, as was before seen, might be brought in the ecclesiastical court by a man for recovery of his wife, if she was taken from him, providing the action was merely to have possession of her; and yet he might also have an action of trespass to recover her; and also, if the case was of that sort, an action *de uxore abductâ cum bonis viri*.³ If a man lived separated from his wife, an action might be had in this court to compel him to receive her and cohabit with her; and this provision of the canon law, as has just been shown, was supposed to be also sanctioned by an expression in stat. 13 Edw. I., c. 34.⁴

It appears, also, that goods promised with a woman in marriage were demandable in this court, after the marriage celebrated; but upon this had arisen some difference of opinion. We have before seen a distinction between a contract to give money, if a person will take to wife a woman, and a promise of money with a woman in marriage; the former being held a temporal matter, the latter such as was proper for this court.⁵ It may be doubted whether the judges were now so nice as to make any distinction upon the wording or form of such agreements, unless they were by deed, and then there was no dispute, but they were purely lay contracts.⁶ For in 14 Edw. IV.,

¹ Corv. Jus. Can., 44.

² Vide vol. ii., c. vii.

³ Goodall, of the Liberties of the Clergie by the Lawes of the Realme, printed by Rob. Wier, tempore Henry VIII.

⁴ Vide vol. ii.

⁵ Ibid., vol. ii.

⁶ 45 Edw. III., 24.

where the declaration merely stated that he had married the daughter of the defendant, and that he should have twenty pounds in respect thereof, all the judges of the common pleas held, that upon the face of it, this was only determinable in the court Christian, *being of the same nature as the marriage*;¹ and it is collected from the Register, that for marriage money, and pensions, suit was invariably to be in the spiritual court.² Mention is there made of such a suit brought against the executors of the person promising, and it being held good, a consultation was granted.³ Indeed, this seemed to be the settled opinion, which prevailed in the two following reigns, and long after. On comparing these cases, we find the law as delivered by Bracton at length re-established and confirmed.⁴ It was also said, that where a man gave goods with his daughter in marriage, and she was afterwards divorced, he might have a suit in this court to recover the goods;⁵ but this must be understood of a divorce for some impediment, and not upon the woman's adultery.⁶

Notwithstanding wills and the administration of intestates' effects were objects of ecclesiastical Of wills and
testaments. judicature, these were matters of such jealous concern that the parliament had more than once interposed to lay down rules for the government of bishops in the article of administration in cases of intestacy. It had been ordained, first, that the ordinary should pay the debts of the intestate, the same as an executor;⁷ and, secondly, that the ordinary should, in such case, always grant administration to the next and most lawful friends of the intestate.⁸ When these grand points were adjusted, the mode of accomplishing either was left to be settled by the ecclesiastical jurisdiction. Upon this head several constitutions had been made, one of them so far back as the reign of Henry III.

It was ordained by a legatine constitution of Cardinal Ottoboni, that no executor should be admitted to the execution of any testament, nor should any testament be proved by him before the ordinary, according to the established custom, till he had, if a layman, expressly renounced

¹ 14 Edw. IV., 6; 17 Edw. IV., 4.

² Reg., 46, 48. Bro. Pro.

³ Reg., 46 b.

⁴ *Vide* vol. ii., c. vii.

⁵ *Vide* Goodall.

⁶ An Apologie, etc., 25 to 27.

⁷ *Vide* vol. ii.

⁸ *Vide ante*.

the privilege of his own temporal court. Such was the contest in those days concerning the jurisdiction over testamentary questions, that it was thought necessary to bind an executor not to avail himself of this difference of opinion. The constitution further ordains, that executors, before they received administration of the effects, should make an inventory in the presence of credible persons who were acquainted with the effects of the deceased, and exhibit it to their superior prelate. If any one presumed to administer before he had made an inventory, he was to be punished at the discretion of the bishop.¹ There are two constitutions of Stephen Langton on the subject of testaments made by ecclesiastics. By one it was ordained, that no benefited clerk should leave anything by testament to his concubine; and if he did, that the whole bequest should, by the bishop of the diocese, be converted to the use of the church which the deceased person held. By the second it was ordained, that religious persons, as from the design of their rule and order they were to have no property, so they should not make any testament; which was conformable with the rule of the pontifical law.²

If religious persons had no property of their own, they were deemed unfit to be trusted with the property of others. It had accordingly been ordained in a constitution of Archbishop Boniface, in the time of Henry III., that no religious persons of whatever order should be executors of testaments, unless by the license and pleasure of their ordinary. This was softened by a constitution of Archbishop Peckham in the reign of Edward I., which required that no religious person should be executor unless his superior was security for a due performance of his duty, and for his rendering a faithful and true account of the overplus to the ordinary of the place: and because some persons wearing a religious habit got themselves to be appointed *distributors* of the effects of deceased persons, as if that was not within the provisions concerning executors, it was now ordained, that the above regulation should apply in both cases; and any one who, without such security, intermeddled in the execution or distribution of such effects, was made liable to the pain of an anathema; so that those who could not give security, could neither be executors nor distributors.³

¹ Const. Ottobon, tit. xiv.

² Lynd., 166, 167.

³ Ibid., 167-169.

The next legislative provision on the subject of testaments is a constitution of Archbishop Mepham, in the beginning of the reign of Edward III. This was to repress a grievance which was a subject of great complaint during the whole of that king's reign. It seems that ordinaries used to exact of executors great securities for the insinuation or proving of testaments, and the commission of administration, in order to extort heavy fees and douceurs. To prevent this in some degree, it was ordained, that for the insinuation of a will of a poor man, the inventory of whose goods did not exceed one hundred shillings sterling, nothing at all should be demanded.¹

Another constitution made by Archbishop Boniface in the reign of Henry III. was revived and re-enacted by Archbishop Stratford in the reign of Edward III. Complaint had then been made, and the same cause continued in the latter reign, that where persons, whether clergy or lay, died intestate, the lords of fees did not permit the debts of the deceased to be paid out of their movables, nor distribution to be made by the ordinary to the use of the wife, children, relations, or others, in such proportion as was due to each, according to the custom of the country. Others, again, prevented persons who were *adscriptitii*, and of servile condition, and women, whether married or single, from making their wills; all which was stated to be in violation of the usage of the church hitherto approved, as well as an offence to the Divine Majesty, and the ecclesiastical law. Such are stated to be the abuses which now prevailed on this subject. For the correction of them it was now ordained, that all persons in such case offending should be involved in a sentence of the greater excommunication. It was further provided, that when a testament had once been proved and approved before the ordinary of the place, it should not be required to be proved and approved before any layman, unless by reason of any lay fee which might be bequeathed in such testament. It was enjoined that none should presume to prevent the effect of any testament or last will, where a bequest was warranted either by particular custom or the general law. All offenders in the above cases were declared to be involved in a sentence of the greater excommunication.

¹ Lynd., 170.

The article of inventories was again provided for in this constitution. It was ordained that administration should not be granted to an executor till a faithful inventory had been made of all the goods, with an exception only of the funeral expenses, and those of making such an inventory. The time of delivering this inventory was left to the discretion of the ordinary. Further, it was provided, as had been before done in the case of religious persons, that after the will was proved, the administration should not be committed but to such persons as were able to give a good account of their administration; and, if necessary, give good security, and make faithful promise so to do, whenever they should be required by the ordinary. As to religious persons, they were not to be executors without the permission of their ordinaries. It was also enacted, that out of the portion that belonged to the dead man, the church should receive its accustomed due; meaning the *mortuary* that was due by the custom of some places.

To prevent all pretences that might be made use of to embezzle the effects of the deceased, it was ordained, that no executor should appropriate Executors. any goods of the deceased under title of a sale, or by any other pretence, unless a gift of them had been made by the testator *inter vivos*, or by will; or they were given to him by the direction of the ordinary for his trouble; or any debt was owing to him from the deceased; or they were taken as a moderate compensation for the expenses of the administration. If he had none of these excuses, a person appropriating any goods of the deceased, would be suspended *ab ingressu ecclesiæ*; nor should be absolved till he had restored the things so unjustly appropriated, and double the value out of his own goods to the fabric of the church to which the deceased belonged.¹

The liberty taken with the goods of deceased persons was a matter of great scandal to the church, and great oppression to the people, and was much complained of during the reign of Edward III. In the sixteenth year of that king, the extent of this evil is thus stated in the preamble of a constitution by Archbishop Stratford. It recites, that some ecclesiastical judges would not permit the executors of deceased persons to dispose of their goods

¹ Lynd., 171-179.

according to the direction of their testators, and the sanctions both of the law and the canons; that they took to themselves the movables of testators, and of intestates (which after the payment of debts should be applied to pious uses); and so sometimes distributed them at their pleasure, both excluding the deceased and their creditors: in consideration whereof many persons, when sick, used to alien their movables, so that churches were defrauded; and creditors, children, and wives, who by law and custom ought to have their shares, were deprived of their due.¹ Such were the abuses; and the remedy provided for them was as follows. It was ordained, that bishops and other ecclesiastical judges should not intermeddle in effects of testators, except so far as the law permitted, under any pretence whatsoever, but should freely permit the executors to dispose of them; and it directs that they should distribute the goods of intestates in this manner: such as remained after payment of debts, were to go *ad pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis, prodefunctorum animarum salute*; and the ordinary was to retain nothing to himself, except, perhaps, something reasonable for his trouble, under pain of suspension *ab ingressu ecclesiæ*.² The provisions of this constitution did not yet remedy the evil: instead therefore of calling again upon the ordinaries to fulfil the duty hereby enjoined, it was judged a better regulation to remove the administration entirely out of their hands; which was done, as we have seen, by stat. 31 Edw. III., which commands the ordinary, in case of intestacy, to depute *the next and most lawful friends* of the intestate to administer his goods.³

By another constitution of the same archbishop, the fees to be paid in cases of wills were fixed. It was ordained, that for the proving, approving, or the insinuation of a will, nothing should be taken by bishops or ordinaries; but to the clerks, a certain reward for their trouble was to be paid. The particular sums to be paid for insinuation, inventory, acquittances, for hearing the account, are prescribed by this constitution in proportion to the value of the effects; if any one took more, he was, within a month, to pay double the value to the fabric of the

¹ Johns. Canons, *ad annum*. ² Lynd., 179, 180. ³ *Vide* vol. iii., c. xiii.

church of the place; if he neglected so to do, the offender, being a bishop, was to be suspended *ab ingressu ecclesiæ*, if an inferior, *ab officio et beneficio*, till he complied. It was also ordained, that no acquittance should be made to an executor, till he had given a true account of his administration, under pain of suspension *ab ingressu ecclesiæ* for six months.¹

Such were the provisions made, at different times, by the ecclesiastical legislature, upon the subject of wills and intestacy. Both these articles are very fully considered by our two canonists, Lyndwood and John de Athona, from whose glosses we are to collect what were the opinions prevailing in the clerical courts respecting these two objects of ecclesiastical cognizance. With the assistance of these writers, we shall be able to acquaint the reader with the law upon this head. We shall begin with *wills*.

It should first be observed, that *wills* were of two kinds; that is, *testamentum*, and *ultima voluntas*; and all the foregoing constitutions make use of both Of the forms of wills, etc. these terms, so that their regulations are applicable to both. The doctors, however, made a difference between them. The former was a more solemn act, attended with all the forms prescribed in such cases by the law-books: if any of these forms were wanting, it was not a testament, but a mere declaration of the *ultima voluntas*. A *codicil* also might go under this title: thus, in our ecclesiastical law, a *testament* and a *last will* seemed to be nearly the same thing in effect:² and we shall accordingly use the word *will*, without any reference to a distinction between that and a testament.

We have seen that the right of wives and of persons

¹ Vol. iii, 126, 127. There is a provision among the legatine constitutions of Cardinal Ottoboni, which commends the practice of distributing the goods of intestates *in pios usus*, and directs that bishops should make distribution according to a statute made by the prelates, with the approbation of the king and barons; meaning, as it should seem, that some statute had been made to warrant such distribution *in pios usus*. This constitution was made in 52 Hen. III. John de Athona, in his gloss on this passage, says that the stat. Westminster 2, 13 Edw. I., c. 19, which requires the ordinary to pay the debts of the intestate, as an executor should, was the statute here meant; which anachronism is very singular in a writer who lived so near the period. Bishop Gibson confesses he cannot discover what statute is here alluded to. It is not easy to suppose that the provision of Magna Charta is here meant. *Vide ante*, vol. ii. Leg. Const. Ottoboni, tit. xiv. John de Athona, *ad locum*.

² Lynd., 173 h.

adscriptitii, and others *servilis conditionis* (meaning, probably, such as held by villein-tenure, though not villeins themselves), to make wills, was vindicated by a constitution of Archbishop Stratford. This constitution is supported by Lyndwood, who lays it down that all persons may make wills, except those who come under any of the following descriptions: first, those who had no sufficient authority, as sons, actual villeins, monks, hostages; secondly, those not having sufficient understanding, as an infant, madman, *mente captus*, and prodigal; thirdly, those who had not sufficient senses, as the blind, deaf, and dumb; fourthly, those condemned to death or to banishment; and, fifthly, those whose true state and condition was not known. Such persons are allowed by Lyndwood to be properly excepted by all the doctors from the privilege of making a will; but as a married woman is not mentioned among these exceptions, he expresses great astonishment that in his time husbands endeavored to prevent them from making wills; and he combats this position with great earnestness.

As to the objection that wives have *nulla bona*, no goods of which to make a will, but that they all belonged to the husband, so that she could not make a will without his permission, he said, that this might, indeed, hold as far as concerned the husband's own goods (though there were some doctors who thought the married state gave the wife dominion over her husband's goods), and he admitted that his permission was necessary to her making a will of any part of *them*. But he contends, that there was a distinction, which made certain goods the property of the husband, and others the property of the wife; for, says he, the prohibition which prevented any gifts between man and wife¹ during the marriage could have no application, unless they had distinct goods; the same may be said of the rule of the canon law, that goods produced from the goods of the husband and wife should be divided equally when the marriage ceased, and that rule which gave the wife's portion back to her upon the dissolution of the marriage. He admits, however, that the husband had power over the wife's portion, and that what was gained by the wife during the marriage was presumed to be gained out

¹ *Vide ante*,

of her husband's goods, and she clearly could not bequeath them. These restraints, therefore, upon the wife were, where it did not appear whence she had made her acquisitions; and he seems to think, that where a rich woman married a poor man, and the acquisitions of the wife could not be supposed to be made out of his property, she would not be restrained from making a will without her husband's consent. He seems to think, that the position which made a husband master of his wife's property was true *in dotalibus*; but this held only *quamdiu bene administrat*; and so long as he was not suspected, nor declining in his circumstances, he was master so as to administer them. But though he was *dominus in dotalibus*, he lays it down peremptorily that he was not so *in rebus paraphernalibus*; for these belonged to the wife even during the marriage, and she might freely make a will of them without her husband's consent. The *bona paraphernalia* are defined by Lyndwood to be, *quæ uxor habet extra dotem*.¹ If we refer to the judgment of the common law, we find it laid down, that a wife might, with the license of her husband, make executors; but his agreement was considered as necessary to make the will good: she might also make her husband executor to her will.²

Next to the *testator*, we should consider the situation of the *executor*, whom he deposes to execute the will he has made. Many points of law concerning the duty and character of executors are agitated by John de Athona, in his famous gloss on a constitution of Cardinal Ottoboni.³ We learn from him, that a minor of seventeen years old might be an executor by a particular custom, though not by the canonical law. It was by custom, also, that a woman might be made an executor. It was a point much debated among the canonists, whether an executor was compellable to take upon him the trust; and some held that he was, because it was a public duty, and a public duty every one was bound to discharge. But this opinion is thought by our glossist to apply to what he calls *executor legitimus*, and not to a testamentary executor, who certainly was at liberty to decline; because no man could impose a duty on another beyond the benefit he received: though when once he had undertaken such duty, he might be com-

¹ Lynd., 173 b.² 4 Hen. VI., 31; 39 Hen. VI., 27.³ Tit., 14.

pelled by ecclesiastical censures to fulfil it. Another question among the canonists was, whether, when there were more than one executor, they were all to concur in being *actor* or *reus* in an action, or in making an agreement. If they were considered in the light of procurators, as some held, they could not act alone; but others held, they were rather in the nature of tutors and curators to minors in the civil law, and then each might act singly for the rest. This latter was the opinion of John de Athona, who says, the custom of the realm was such in the temporal courts in his days; though he admits that in judicial matters it was necessary for them all to join.

Another question was, whether such action as an executor had against his testator, was extinct by the executorship. Some thought that it was; others, that it was not, considering there was an heir against whom an action might be brought: though if there was no heir, it was the opinion of our glossist that the executor might, without any breach of trust, openly take what was owing to him; and he adds, that any legacy left to him ought not to deprive him of his *actio funeraria*. After this, there could be no doubt, as it was with some of the foreign canonists, whether any and what action could be brought by an executor; distinguishing between a *nudus executor*, and one who had an interest. It was held, that every executor might bring all actions that related to the administration of the last will; and if he omitted to bring such as were necessary, the diocesan might. Similar to the last was the question, whether an executor might come to a compromise or make any agreement with the heir or any debtor of the testator. Some thought he could not remit a debt any more than a *procurator ad agendum*, unless, perhaps, with the consent of the legatees and creditors, who were materially interested: or he had a special authority from the testator so to do. Others thought, that as it might be paid to him, and he might bring an action for it, especially if he was deficient in proofs, and a suit would be hazardous, he might compromise a debt.

In the time of John de Athona, it was a question whether an executor should give security for a due administration; and then a distinction was made between a testamentary executor and one appointed by the ordinary, who was called *legitimus*; and it was held that the

former need give no security: but we have seen, that by later constitutions, executors of every kind were required to give security.¹ He also examines, whether in giving an account of their administration, it was sufficient to verify what they did upon their oaths; which points we shall consider presently. When an action was brought, either by creditors or by legatees, against an executor, they were not bound to show the sufficiency of the property to satisfy their demands, but that was to be presumed till the contrary was shown by the executor. Another question in the time of John de Athona was, whether an executor might buy any goods belonging to the testator; but this was afterwards settled in the negative by constitutions before mentioned.² As to the point, whether the heir or the executor should be proceeded against by a creditor or legatee, it was held by some that the heir should, by others that it should be the executor, in all cases of demands on the movables; but our glossist says, that this must, after all, lie in the option of the claimant.³

When the will was made, and the executor appointed, then was the authority of the bishop necessary to carry it into execution. The bishop's authority applied to these points: the proof and insinuation of the will, the making an inventory, the committing of administration to the executors, and, lastly, the demanding of the executor an account of his administration.⁴ The regular course was, that the proof of a will should be before the ordinary of the place where the testator died; and formerly, when a person had effects in more dioceses than one, they contented themselves with one probate; but the ordinary of each diocese was to give administration of the goods within his diocese, and was to call the executor to account. Thus stood the practice in the time of Edward I., as appears by the constitution of Cardinal Ottoboni and the gloss of John de Athona thereon, so often referred to. But at the time of which we are now writing, a different practice had obtained; for we are informed by Lyndwood that the Archbishop of Canterbury, in his province, took to himself, as well the proof and insinuation of all wills, as to commit

¹ *Vide ante.*

² *Ibid.*

³ John de Athona, in Const. Ottoboni, tit. xiv., *per totum.*

⁴ Lynd., 179 t.

the administration of the goods, and to call the executors to account, in all cases, where the testator had *bona notabilia* in different dioceses within his province. The prerogative of the archbishop had given rise to much argument on the meaning of *bona notabilia*; and Lyndwood, upon the authority of constitutions, of doctors, and of reason, takes upon him to pronounce *bona notabilia* to be such whose possession would exempt the owner from the description of *pauper*; but, proceeds he, one who has less than one hundred shillings sterling is a *pauper*; from whence he concludes, that one having less than one hundred shillings had not *bona notabilia*.¹

The probate of the will is spoken of under different terms by our great canonist; the *probatio* or *publicatio*, and the *approbatio* or *insinuatio*; the two former denoting the act of the executor; the two latter, that of the bishop. The will of the deceased person was required to be *proved* by two witnesses who were *omni exceptione majores*. When that was done, the ecclesiastical judge was to give his *approbation* to the proof.² It was only in respect of the *bona*, or movables and personalty, that a will became the object of cognizance to the ecclesiastical judge; he pretending no claim over a devise of a lay fee; but if a will contained both it was necessary that it should be approved by the spiritual judge.

The making of an inventory, which was the next step, and was so earnestly pressed by the above-mentioned constitutions, was as requisite for the security of the executor as of the effects; for it had become a rule of the canonist, that where a person intermeddled in the administration without having made such an inventory (except for the expenses of the funeral, the probate and inventory, and the necessary preservation of the property), a presumption was raised of sufficient assets, and he was bound to answer to every one of the creditors.³ If no inventory was made, the acts of the executor were still valid; but he might be removed, as a suspected person, by the ordinary.⁴ It is said by Lyndwood, that debts which were not secured by some instrument or obligation, need not be inserted in an inventory till they were received.⁵

¹ Lynd., 174.

² Ibid., 174, f. g. h.

³ Ibid., 176 p.

⁴ Ibid.

⁵ Ibid., 168 h.

The *sufficiens cautio*, which was required by the above constitutions, created some doubts among the canonists; for a *sufficiens cautio* might be of three kinds: it might be either *pignoratitia*, *fidejussoria*, or *juratoria*; and it seems to have been left to the discretion of the ordinary which of these he would take. If a person was suspected, he would be required to give one of the two former; if he was a credible person, the latter was sufficient.¹ Another consideration which weighed in this point, was the situation of the executor: if he derived any benefit under the will, he was to give one of the former securities; but if he was a mere *nudus executor*, he was not required to give either of the higher securities. Another consideration seems to have been, whether he was a testamentary executor or appointed by the ordinary, and so called *legitimus*; for the former, being a person entrusted by the testator, ought not to be suspected by the ordinary; and therefore the latter security of an oath was thought sufficient in such case; nor was that to be required till the administration was completely finished.²

After the ordinary had committed administration, he might remove the executor, if there was any suggestion of fraud and mismanagement of the effects,³ or if he could not give a good account of his administration. In taking an account, the bishop seems to have had the same discretion as in taking caution for a due administration. According to the character and circumstances of the parties, he might require a *plena probatio*, or content himself with the oath of the executor; and as to the account, he might require it to be more or less particular.⁴

In giving a true account of his administration, it must arise very often that the executor would have a residuum, either by reason of legatees dying before the testator, or by reason of the effects exceeding the dispositions made in the will. In such case the law is thus laid down by Lyndwood: if the executor was a *nudus minister*, who was to have no benefit, he could not apply this residue to his own use; but where the executors, says he, are *executores universorum bonorum*, such persons being *in loco hæredum*, were to take everything that was undisposed of by the

¹ Lynd., 169 a.² Ibid., 170 h.³ Ibid., 177 g.⁴ Ibid., 168 l.

testator; and yet, says he, such an executor would do well, if he disposed of the overplus by the advice of the ordinary.¹ In the other case, the testator would be considered as dying intestate with regard to such undisposed property.

The consequences of intestacy were not much better ascertained than they were before the stat. 31
Of intestacy. Edw. III. The difference merely was, that instead of trusting to the discretion of a bishop for distributing the effects *in pios usus*, the administration was to be committed to the next and most lawful friends of the intestate, who were to administer, and dispend them for the soul of the deceased.² The text, therefore, of the canon law was still the rule by which the administration was to be governed; and we must recur to our provincial constitutions to learn what was such an application of the property as might be said, according to the notions of these times, to be for the benefit of the deceased person's soul. The constitution of Archbishop Stratford above mentioned directs that the goods of an intestate which remained after the payment of debts, should be distributed *ad pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis, pro defunctorum animarum salute*.

The interpretation put upon *piæ causæ* by the canonists was extensive. We are informed by Lynd-
Of pious uses. wood, that any person who was an object of compassion, an orphan, widow, or pauper destitute of support from himself, those rendered infirm by disease or age, being also poor, all such were objects that came under the description of *piæ causæ*. They also reckoned under the same head, the watching of a city, the repairing of bridges, roads, walls and ditches of a city or castle, and the like, particularly in cases of necessity. To these they added, as might be expected where churchmen were the interpreters of the law, the ornaments and fabric of churches, lights, anniversaries, and incidents relating to divine worship: gifts *pro emandandis forefactis*, and *pro malè ablatis*, were deemed of the same kind. In general, anything given *pro animâ*, was judged to be of this description; and yet a gift to a father or mother *pro animâ* was not so esteemed unless they were poor.³

¹ Lynd., 179 c.

² Vide vol. iii., c. xiii.

³ Lynd., 180 d.

The *piæ causæ* being ranked as the first objects of consideration in this constitution, it should seem as if nothing was to go to the *consanguinei*, and the others there mentioned, till some portion had been first bestowed on some of these righteous purposes. After these follow the *consanguinei*, the *servitores*, the *propinqui*, and *others*. The church had laid down to itself a different rule for the distribution of the effects of a layman and a clerk, and of a beneficed and non-beneficed clerk. If a beneficed clerk died intestate, the goods which accrued to him by means of his benefice were, by the canon law, to go to the successor; those that had become his property on other personal considerations, were to go to the *consanguinei*, and, upon failure of them, to the church. The same of a clerk not beneficed; only provision had been made in the early times of Christianity, that the widow should come in after the *consanguinei*, and before the church. In case of laymen intestate, upon failure of the *consanguinei* and the widow, the *fiscus* was to succeed. The manner in which the *consanguinei* were to be reckoned is thus laid down by Lyndwood. The first consideration, says he, in the succession *ab intestato*, is that of the children; the second, of the ascendants, with some collaterals, if any are extant; the third, of the transverse line; the first two being extended *in infinitum*; the third only as far as the tenth degree, whether *agnati* or *cognati*. Upon a failure of these, and not till then, if there was any widow of the deceased, she was to succeed; and after her the *fiscus*.¹ The portion to the *servitores* was to be according to their several merits. *Propinquus* might be understood either of blood or neighborhood, and the *others*, according to Lyndwood, must be poor persons; who having before been reckoned among the *piæ causæ*, were thus doubly provided for.² The whole of the effects to be distributed in the above way; formerly by the ordinary (without reserving anything to himself), but since the stat. 31 Edw. III., by the next and most lawful friends, in such proportion to each of those objects as seemed good to the person distributing. It is made a question by Lyndwood, whether under the description of *consanguinei* or *propinqui*, anything could be demanded *de jure* by bastards and spurious children; which he answers

¹ Lynd., 180 f.

² Ibid., 180 h. i. k.

himself in the negative: but he thinks they ought to be considered under the light of poor persons, and should be provided for *per viam eleemosynæ*.¹

Such was the rule of the ecclesiastical law respecting the distribution of intestates' effects, if that can be called a rule which was no direction, and that law which had no sanction to enforce it; for the proportion to be assigned to each of the objects intended to be benefited is nowhere ascertained. This was to depend, first, on the discretion of the administrator; and, secondly, on that of the bishop, to whom he was to be accountable; and the person who was to be entrusted with this charge was to be chosen by the bishop, under no other restriction than that of being next and most lawful friend of the deceased. It cannot likewise but be remarked, that the postponing of the widow to the descendants and ascendants *in infinitum*, and to the *agnati* and *cognati* as far as the tenth degree, was a very inequitable and unjust disposal of the husband's property, and could hardly be palliated by the probability of his having lands, out of which she would be entitled to dower.

The correction of these inconveniences was to be sought elsewhere. In different parts of the kingdom ^{The} particular customs prevailed which controlled ^{rationabilis.} the general law of intestacy. The custom of a province, of a county, of a city, or a district, was to be found in numberless places, and the property of deceased persons was thereby divided with more certainty, and with less interference and discretion of strangers. In some places it was the custom, if the deceased left a wife and no children, that half of the goods were considered as the part of the deceased, and the other half went to his wife; the same if he left only children; if a wife and children, then a third belonged to the deceased, and the other two-thirds to the wife and children; if there was no wife, nor children, then the whole belonged to the deceased. In some the wife took all; in others, the children: and when goods were in places where different customs prevailed, they were to be divisible according to the custom of the place where they were respectively found.² If no disposition was made to the deceased person's third, or

¹ Lynd., 180 b.

² Ibid., 172 l. m.; 178 a.

half, as the case might be, that also became subject to a like division, according to the custom.

Of all these customs, that which gave a third to the wife, another to the children, and a third to the deceased, and in case of only a wife, or only children, the half, was most frequently met with; and it seems to have so generally pervaded the kingdom as to be mistaken for the general law of intestacy. Indeed this claim of the wife and children, where it prevailed, had been carried still further: it had been construed to be such an inherent right in them, as to restrain the power of disappointing them of this *reasonable part of the goods* by will; the possessor, it was contended, having a power of disposing by will of nothing but his portion, or *dead man's part*.

We have before had occasion to relate the discussion that this claim, at different times, raised in our temporal courts.¹ The question had all along been, whether this was a common-law right, or one supported only by the special custom of different places; and the last determinations in the reign of Edward III. seem to countenance the latter opinion. Conformably with those decisions, we find an action in the reign of Henry VI.,² and another in the reign of Edward IV.,³ against an executor for a reasonable part, where a special custom of a county is alleged. There is an instance of one action, which was grounded upon the usage generally, without stating it to be of the realm, or of any county or place.⁴ If we look a little further on in our judicial history, we find it laid down positively by Fitzherbert and others, in the reign of Henry VIII., that this claim of the wife and children was by the common law that prevailed through the whole realm; and that the action *de rationabili parte* might be maintained against the executors;⁵ so that the power of making a will was, in case of leaving a wife or children, confined to the dead man's part. This opinion seems to be strenuously maintained by Brooke, some time after the reign of Henry VIII. Thus stood this question about succession to personal property, whether in case of a will or intestacy, in the reigns of Edward VI. and Queen Mary, and for some years after.

¹ *Vide ante*.

² 28 Hen. VI., 4.

³ 7 Edw. IV., 20, 21.

⁴ 30 Hen. VI., 95; Bro. Racion, part 7.

⁵ Bro. Racion, part 6.

Before we leave the subject of will and intestacy, it will be proper to lay before the reader such few notices on the point of jurisdiction as are to be found in the books of common law. And first with regard to executors, and the suits they might bring, or be liable to, we find it very early laid down, that a man could not generally sue an executor in the spiritual court for the testator's debt; yet if the testator enjoined the executor to pay such debt, then he might sue for it in the spiritual court, because of the injunction and promise: and this was considered as law so low down as the reign of Henry VIII.¹ An executor might sue another in this court for the testator's goods: as where goods were bequeathed, and a stranger obstructed him in bestowing the legacy, the executor might sue him in this court;² but if the goods bequeathed were taken from the executor, he must bring trespass, and could not sue in this court.³ So generally was it settled that legacies should be sued for in this court, and not in the temporal, that if a termor bequeathed his crop, this court would hold plea of it.⁴ Where one sued in this court for goods devised, which another claimed by deed of gift, and thereupon brought a prohibition, it was held, that being a legacy, it could only be determined in this court.⁵ Considering the legatee has such action, it was held, that he could not take the goods without the executor's consent;⁶ besides, the law did not oblige the executor to pay them till the debts of the testator were paid.⁷ But where land was devised, the devisee might enter immediately, as he had no suit to demand it in the spiritual court.⁸ If anything was bequeathed for the reparation of the fabric of a church, the executors might be sued in this court.⁹

The article of tithes has not hitherto been mentioned in any other way than as an object of judicial cognizance, which was at different times disputed between the temporal and spiritual courts.¹⁰ It is only once that we were called upon to notice the nature of this provision for the clergy, and this was on the occa-

¹ 6 Hen. III., Fitz., Proh., 17; and *vide* Goodall, etc.

² 4 Hen. III., Fitz., *ibid.*

³ 2 Rich. III., 17.

⁴ 37 Hen. VI., 9; 8 Hen. III. Fitz., Proh., 19.

⁵ 46 Edw. III., 32.

⁸ *Vide* vol. ii., c. viii.

⁶ 20 Edw. IV., 9.

⁹ Reg., 48 b. *Vide* An Apologie, etc., 22-24.

⁷ 2 Hen. VI., 15.

¹⁰ *Vide ante.*

sion of the statute of *sylva cædua*.¹ In no other instance had the legislature thought it necessary to interpose for settling questions of tithe; and our temporal courts had no authority to prescribe any rules on this head. The decision, therefore, to ascertain "what was tithe, and what not," remained wholly with the spiritual court and the clerical legislature. The nature of tithes, in this country, must be collected from the constitutions of provincial synods, the volumes of the canon law, and the opinions of learned doctors. To these we must now resort; and we shall, with the assistance of our countryman Lyndwood, lay before the reader what appears to have been the opinions on this subject which prevailed in our ecclesiastical courts during the reigns of Henry VI. and Edward IV.

The text of our law of tithes is chiefly comprised in three constitutions of the time of Edward II. These were made by Robert Winchelsey, Archbishop of Canterbury, in different synods held for his province. The first of these is stated, at the opening of it, to be for preventing disputes, and for rendering the claim of tithes uniform through the whole province. It ordains that the tithe of fruits should be paid in full,² without any deduction for the expense of raising them, or any diminution whatever: the same of the tithe of fruits of trees, the tithe of all sorts of seeds, and the tithe of herbs in gardens, unless any adequate³ composition was made for them. It declares that tithe should be demanded of hay, wheresoever it grew, whether in large meadows or small, or even in the highways. The tithe of lands was ordered in this way: if the number was six, or less, six *oboli* were to be given by way of tithe; if they were seven, the seventh was to be given as a tithe, and the parson was to return three *oboli* to the person paying it, as a compensation to reduce the tithe to a fair tenth; if there were eight, the parson was to have the eighth, and give only a denarius as a compensation; if nine, the parson had the option to take the ninth, and give one *obolus*⁴ to the parishioner, or to wait till the next year, when he might

¹ Vide vol. iii., c. xiii.

² *Integrè.*

³ The word in the original is *competens*.

⁴ These are the terms in the constitution; and I do not pretend to solve the difficulties there are in the Latin names for our old money.

have his tenth lamb. The parson so waiting was allowed to take the second or third lamb, at least, of the second year, in consideration of his forbearance in the first year. The same rule which was here laid down about lambs was directed to be observed in the case of the tithe of wool. But if sheep were fed during winter in one place, and during summer in another, the tithe was to be apportioned. In like manner, if in the interval between those seasons any one bought or sold sheep, and it was certain from what parish they came, the tithe of such sheep was to be apportioned as the tithe of a thing which had two domiciles; if the former parish was not known, then that parish within which they were sheared was to have the whole of the tithe.

It was required that tithe should be paid of milk, that is, of cheese in the season for making cheese; and of milk itself in autumn and winter, when it was not usual to make cheese. But for these the parishioners might make an adequate composition, which was always to be to the value of the tithe, and in favor of the church. Tithe was required to be paid of the produce of mills; of pasture of all sorts,¹ as well that which was not common as that which was, according to the time and number of them. Tithe was required of fisheries and of bees, and of all other goods which were justly acquired, and were renewed annually. Personal tithes were also to be demanded of artificers and merchants for the gains of their trade, and of all workmen receiving a certain stipend; unless the stipendiary choose to contribute something in certain for the use or ornament of the church, and the parson consented to accept it.²

The foregoing provision about the tithe of wool seems to have not sufficiently obviated the difficulties that followed upon the removal of sheep from one pasture to another. To ascertain this more minutely, it was provided by subsequent constitution of the same prelate as follows: The tithe of wool, milk, and cheese was to be fully paid to the church of the parish where the sheep

¹ The words in the original are *de pasturis et pascuis*, which are pastures of different kinds, in the construction of the canonists; the latter signifying pastures for sheep, in places not cultivated nor ploughed; the former all sorts of pasture.

² Lynd., 191 to 196.

were continually fed and couched, between the time of shearing (which was after the middle of May, and before the middle of June and the feast of St. Martin), although they were afterwards removed into another parish, and there sheared: and to be certain of this payment, the sheep were not to be removed till security was given to the parson for payment of the tithe. If they were removed within those times to another parish, each church was to receive a proportion of the tithe, according to the portion of time; provided that no account should be taken of any space of time less than thirty days. This provision must be considered as applying only to the tithe of wool, that of milk and cheese being to be received instantly at the parish where the sheep were fed and couched. Again, if the sheep fed in one parish and couched in another, the tithe was to be divided between the two churches. If after the feast of St. Martin sheep were carried to other pastures, and till the time of shearing were fed in one or several parishes, either in the pastures of their owners or of others, it was ordained that the feeding should be estimated according to the number of sheep, and tithe should be demanded of the owners according to such estimation.

The tithe of milk and cheese from cows and goats was to be paid where they fed and couched; and if they fed in one parish and couched in another, the tithe was to be divided between the parsons. Lambs, calves, colts, and other tithable younglings, were to be tithed proportionably, having respect to the several places where they were begotten, born, and fed, and the time they were in the several parishes. It was left to the custom of different places to decide what should be paid for tithe, where the milk for the small number of cows was not sufficient for making cheese; and what for lambs, calves, colts, fleeces, geese, or such things as are too small to pay a certain tithe. If sheep were killed, or died by accident, after the feast of St. Martin, tithe was to be paid to the parish-church. If sheep belonging to one parish were shorn in another, the tithe was to be given to the parson of the parish where they were shorn; unless it could be shown that satisfaction had been made for the tithe elsewhere.¹

¹ Lynd., 197-199.

To these two constitutions may be added a third of the same prelate, in which the articles subject to tithe are briefly summed up. It ordains that tithe should be paid of milk;¹ of the profits of woods, pannage, of woods and of trees, if sold; vivaries, piscaries, rivers, ponds, trees, cattle,² pigeons,³ seeds, fruits, beasts in warrens; of fowling; of gardens; curtilages, wool, flax, wine and grain, turves in places where they were dug and made; swans, capons,⁴ geese, ducks, eggs, hedge-rows;⁵ bees, honey, and wax; of mills, hunting, handicrafts, and merchandise; as also of lambs, calves, colts, according to their value. In short, says the constitution, let satisfaction be made of all other things to the churches whereunto they by law belong; no deduction being made, in calculating the tithe, for the expenses attending the production of the thing, except only in handicrafts and merchandise.⁶

In the following reign, we find a constitution of Archbishop Stratford upon the subject of *sylva cædua*.
Sylva cædua. Persons, says that ordinance, had refused to pay tithe *de sylvis cæduis, et lignis arborum cæduarum excisis*, though these cost less labor than the fruits of trees; alleging that they had never before paid it; and expressing a doubt what was properly *sylva cædua*. To remove this doubt it was now ordained that *sylva cædua* was that wood, of any kind, which was kept on purpose to be cut, and which, being cut, grew again from the stump or root: of such wood, it was declared that a real or prædial tithe should be paid.⁷ This is a more satisfactory explanation than the negative provision made by parliament on this head, in the same reign, which has been before mentioned;⁸ and which merely declared that wood of twenty years' growth felled for ship-building, or the like uses, should not be construed to be *sylva cædua*; this statute, however, is a sort of evidence that the definition con-

¹ The constitution adds, that this tithe shall be paid in August as well as the other month; it is therefore probable that people claimed to be exempt from such tithe during this month. This being the principal harvest month, men might think it hard to pay tithe of milk, while they were paying tithe of corn, and were obliged to feed their harvesters with the milk. Johns. Canons, *ad locum*.

² *Pecorum.*

³ *Columbarum.*

⁴ *Caponum*; the Oxford copy has its *pavonam*.

⁵ *Thenecii agrorum.*

⁶ Lynd., 199–201.

⁷ *Ibid.*, 190.

⁸ *Vide* vol. iii., c. xiii.

tained in the above constitution was not sufficiently attended to.

Upon these legislative regulations for the due payment of tithes, several observations arise, which have not escaped the accurate and discerning Lyndwood. These contribute to open some difficulties, with which the subject would be otherwise embarrassed. As to the uniformity which the first of these constitutions was to introduce through the whole province, it had, according to Lyndwood, no other meaning than that tithes should be universally paid; for the different customs that prevailed in various parts of the kingdom were still to govern with respect to the mode in which they were to be collected. Various were the customs by which tithe used to be collected. Thus it was the custom in some places to tithe corn in sheaves, in others it was tithed while loose; in some it was tithed in the field, in others in the owner's barn; in others it was carried to the parson's barn.¹ The time of winter and summer, mentioned in the above constitutions, depended on the customs of different countries: in some places, sheep were removed from one pasture to another about Michaelmas, and were there fed till Candlemas, or St. Peter, or the Annunciation; in others they were removed at the feast of All Souls, and continued till the feast of St. Philip and St. James; and the winter accordingly was said to commence and finish at those several periods.²

It depended upon custom what should be paid for any particular tithe: but such customs were always subject to this correction, that tithes being due, as the canonists held, *jure divino*, they could never be diminished in value below the just tenth, by any custom; though a custom was esteemed good which gave to the church more than the real tenth. If a custom could not diminish the value of the tithe, much less would it be allowed to take away the whole tithe: a custom, therefore, *de non decimando* was held to be bad.³

Tithes were divided into *great* and *small*, and into *prædial* and *personal*. Among small tithes were reckoned wool, flax, milk, cheese, honey, wax, eggs, lambs, poultry, and the other productions of animals, the fruits of trees, and all the productions of gardens:⁴ the rest were considered

¹ Lynd., 192 f.² Ibid., 194 b.³ Ibid., 199 r. n.⁴ Ibid., 192.

as great tithes. Prædial tithe was that which arose from mills, piscaries, hay, wool, bees, and the fruits and produce of the earth: it was so called because it came from a certain place.¹ Personal tithes were such as were paid rather in respect of the person than the soil, as from the profit of a man's labor and employment. Some articles were of a mixed nature, arising partly from the soil, and partly from the labor and employment of men; as lambs, wool, milk, and some other things; and it was a matter of argument among the canonists, whether these were properly prædial or personal tithes. But the better opinion seems to have been, that they were prædial. Yet the shepherd who had the custody of the sheep was bound to pay also a personal tithe of his wages. It was material to ascertain whether a tithe was of the former or latter description; because prædial tithes were due to the church of the parish where the land on which they arose was situated; personal tithes to the church where the person paying them heard service and received the sacraments.²

It is put as a question by Lyndwood, whether the parson ^{Composition for tithes.} could enter into a permanent composition with his parishioners to receive less than a tenth; and he answers it in the negative. For though, says he, a composition for tithes might well be made between clerks, yet it would not hold between a clerk and a layman. But in this there was a distinction: such a composition, if for tithes already due, was good; but for tithes to be paid, a composition with a layman was held not to be good, unless sanctioned by judicial authority of the bishop.³ The composition therefore spoken of in these constitutions must mean such a one as was to have no binding force on the successor, and was only to adjust payments that ought to have been made before. Compositions of both sorts seem to have been very common for small tithes.

Prædial and personal tithes might, by possibility, be due in consideration of the same thing. This was the case with respect to fish. If fish were taken in an enclosed place, a prædial tithe was due to the church of the parish where they were taken; but if they were taken in a stream that passed from one place to another, then a personal tithe would be due to that parish church at

¹ Lynd., 192.² Ibid., 200 b.³ Ibid., 192, s. 192.

which the person taking them heard divine service and received the sacraments. This, however, was only where a person fished without paying anything for such liberty; for where he paid any rent or price, then a tithe of such rent or price was due to the church of the parish where the fish were taken: the same of the tithe of birds and beasts. The tithe of fish caught in the sea was considered by some as prædial; though the better opinion was, that this was a personal tithe.¹

The tithe of mills, according to the above constitution, consisted in the tenth of their produce; and this, says Lyndwood, could only be effected by paying the tenth measure of all the corn ground there, for the benefit of the lord or the miller. For it was not sufficient to pay the tenth of the rent, that being not the true value, as the tenant was to gain something beyond the rent; but if the lord paid a tithe of the rent, and the tenant of his gains, everything that was due to the church would be paid; and if the parson preferred it, the tithe might be paid in that way. The produce of a mill was to be tithed as a prædial tithe, without deducting the expenses; but if the mill was sold, then the expenses would be deducted; and after that the residuum, which was the clear gains, would be tithed as a personal tithe. The expenses were considered in three lights: those *in re*, those *circa rem*, and those *extra rem*. Thus, suppose a mill was bought for £100, this was of the first sort of expense; £20 was laid out upon repairs of it, this was of the second; and £10 for workmen, horses, and the like, this was of the last sort; in the whole £130. If the mill was retained for six years, and yielded £10 *per ann.* produce, one of that ten would be paid each year in name of tithe, without any deduction of the expenses; but if the mill was to be sold at the end of the six years for £150, a personal tithe must be paid of the profit, after allowing all the expenses. But some doctors, among whom is Lyndwood, thought that the expenses *extra rem* should not in this case be deducted; and therefore the profit to be tithed, according to them, would be £30.² It was held, that where tithe was paid for milk, and cheese was made of the other nine parts, no tithe should be paid for such cheese; but if the

¹ Lynd., 195 q.

² Ibid., 195 c.

cheese was sold, a personal tithe should be paid for the gains made thereby;¹ so anxious were they that a tithe should be paid upon every possible gain.² Personal tithes were due at the time when the gain on which they arose was received; but on account of the smallness of them, it is thought by Lyndwood that they should rather be paid at the end of the year. They were due only of the clear profit: if a thing, therefore, instead of being sold, was given away or kept by the owner, it was not tithable, because there was no profit; but according to the opinion of some doctors, if the money wherewith it was purchased had paid no tithe, the thing which came in its place should be tithed.³

The personal tithe that was demandable of the profit on merchandise was a very serious consideration in towns and cities. In the city of London, there was a custom to pay by way of offering one farthing upon every ten shillings rent of a house, on Sundays and certain feasts in the year. It had been endeavored to represent this as a payment in lieu of such personal tithe as arose from profit in merchandise; but Lyndwood combats this opinion with great earnestness. He contends, that if this is at all to be considered as a tithe, it is a prædial one, being paid in proportion to the rent, which is prædial; if so, how, says he, is the payment of a prædial tithe to be a reason for exempting a person from paying a personal tithe? But the ordinance of the city expressly calls this an offering, and therefore it cannot be in lieu of any tithe whatever. For these, among many other weighty reasons, he concludes, that the tradesmen, artificers, and merchants of London are not, by reason of this offering, exempt from paying a personal tithe of their profit in merchandise and employments.⁴

To secure the regular payment of these dues, all rectors, vicars, and chaplains are enjoined by the above con-

¹ Lynd., 194 b.

² The sweeping words in the constitution are *de omnibus bonis JUSTE acquisitis*; upon which expression it is gravely laid down by Lyndwood, in conformity with some foreign doctors, that personal tithe was not demandable out of the gains of common prostitutes as long as they continued in a state of impenitence; but when they became penitents, it might be accepted; and even before, provided the consent of the diocesan was obtained. Lynd., 195 o.

³ Lynd., 195 y.

⁴ Ibid., 201 d.

stitutions to admonish their parishioners of their duty in this respect to the church. If they disregarded such admonitions, they were to be suspended *ab ingressu ecclesiæ*; and if they still continued obstinate, were to be proceeded against with ecclesiastical censures. And further, if the rector, through fear or indolence, was negligent in demanding his tithes, this neglect of the church's rights was to be punished with suspension till he paid a fine to the archdeacon.¹

To this account of the law of tithes given by our canonist, it does not seem at all necessary to add anything from our books of common law. It was so expressly laid down by the statutes of *circumspectè agatis* and *articuli cleri*,² in what cases they were objects of spiritual or temporal jurisdiction, that there had rarely arisen any controversy upon that head. If they were not converted into lay chattels, or bound by any lay contract, or in particular cases, as if they did not exceed a fourth part of the benefice, they were clearly within the cognizance of the spiritual court. It must, however, be remarked, that there is a case in the time of Edward III. in the exchequer, where a king's debtor prayed process against a person who had part of his goods, and so rendered him less able to satisfy the king's demand; upon which the party appeared, and claimed the goods as tithe; the other did the same as parson; after this the person brought in by process pleaded to the jurisdiction. This plea, we are told, was not allowed, but the question was held to belong to the exchequer, because it was the king's suit. The reporter expresses his surprise, and adds, that neither the king's bench nor common pleas would in like manner entertain suits for tithes.³ This case happened about twenty years after the proceeding for tithes by *scire facias* in the temporal courts had been taken away by statute.⁴

Having gone through the three points of most intricacy in the common course of clerical judicature, causes of matrimony, of testaments, and of tithes, we shall pass on to those which involve less discussion, and therefore, though of great importance in themselves, require less attention in the student.

¹ Lynd., 196, 197.

² *Vide* vol. ii., c. x.; iii., c. xii.

³ 38 Ass., 20.

⁴ *Vide* vol. ii., c. vii. How matters of equity became cognizable in the exchequer, by reason of the suit of the king, *vide* vol. ii.

The title of benefices ecclesiastical, without touching the trial of the patronage, belonged to this court, and might be brought in question in two ways, either upon the avoidance or spoliation of a benefice: the former are declared to belong to the spiritual judge, by stat. 25 Edward III., *pro clero*, ch. 8. They might depend either upon death, resignation, deprivation, creation, or cession. Whether a church was full or not, or the clerk properly qualified, was triable by this court.¹ The spoliation of a benefice was triable in this court only where a clerk was in as an incumbent; for if he was in as an usurper of the church, which was full, or as a trespasser, the remedy was by action of trespass, and not by suit for the spoliation.² If two incumbents were in, and they claimed by different patrons, no spoliation would lie, because the right of advowson came in question; but where they both claimed by one, a suit for spoliation lay.³

Pensions granted out of churches, mortuaries, and oblations, belonged to this court, both by stat. *circumspectè agatis*,⁴ and by the common law.⁵ A pension might also be sued for at common law, by writ of annuity; but if the claimant went upon a prescription, and afterwards sued for it as a pension in this court, a prohibition would lie.⁶ It was held, in the time of Edward III., in an assize, to be a good plea to the jurisdiction of the temporal court to say that the land was a churchyard:⁷ this was conformable with the law before laid down by Bracton;⁸ and it was once held, that if a person took trees in a churchyard, the remedy was not by trespass, but by suit in this court.⁹ That a parish or hamlet claiming a right to have a curate to perform divine service, might proceed to establish such right in this court, was considered as of long usage; notwithstanding, an action upon the case was held maintainable for such neglect.¹⁰ We find a suit for withholding a chauntry was deemed good, upon consultation; which, being within the same reason, gives sanction, as it should seem, to the other case. The parishioners might be cited in a cause of *contribution* towards the reparation of the

¹ 22 Edw. IV., 24.

² 44 Edw. III., 33.

³ 38 Hen. VI., 19, 20. An Apologie, etc., 31.

⁴ Vide vol. ii., c. x.

⁵ Reg., 47.

⁶ Vide Goodall, etc.

⁷ 44 Ass., 8.

⁸ Vide vol. ii.

⁹ Fitz., Prob., 26.

¹⁰ 22 Hen. VI., 52.

body of a church, is proved from the statute *circumspectè agatis*,¹ from the Register;² and from authorities in the time of Henry VIII.³

It seems unnecessary to adduce any authorities from our statutes or books of common law to show what countenance had been given to the judicature of this court, in the punishing of offences that savored of impiety. If a court Christian has any jurisdiction at all, it is surely in matters of this nature; and the legislature, instead of making any special recognition of such authority, has been content to pass it over under the general description of *merè spiritualia*, or of crimes for which the punishment of penance used to be inflicted.⁴ It is true, that of late years the legislature had been induced to point out certain new sectaries as objects of particular animadversion; but they at the same time fully recognized the former authority of the bishops.⁵

Perjury in an ecclesiastical cause or matter, was an offence properly cognizable in this court. Under the title of perjury we come to consider the breach of a voluntary oath, whether taken privately, or publicly before an ecclesiastical judge, as was common in these days. This has been frequently before mentioned, under the term of *læsio fidei*, as a disputed object of clerical judicature. The same doubt seems still to have continued; for upon comparison of some cases, in this and the foregoing reigns, there is a contrariety that stands in need of some distinction to reconcile it. In the case of the vicar of Saltash, who had made an obligation, and had bound himself to the observance of it, by oath taken before the pope's collector, it was declared by Hankford, justice, that no one should be sued before the ordinary for perjury, but where the principal matter on which the perjury arose was of a spiritual nature; for if it was otherwise, he might in that manner be compelled to perform lay contracts, which belonged only to the temporal courts.⁶ A few years after, it was likewise held, that where a man had sworn to make a feoffment, he should not, for the above reason, be sued for breach of his oath in the

¹ *Vide* vol. ii., 520.

² Reg., 45, 48.

³ F. N. B., Consult.

⁴ *Vide ante*.

⁵ Stat. 2 Hen. IV., c. 15, and 2 Hen. V., c. 7.

⁶ 2 Hen. IV., 15. Bro., Præm., 16.

clerical court.¹ These cases happened in the reign of Henry IV., and the spirit of them was maintained in some opinions delivered in the two present reigns. In 38 Hen. VI. the same law was laid down by Fortescue in the exchequer chamber, and was admitted by some others of the judges, and denied by none.² Again, in 20 Edw. IV. it was declared by Brian, that where faith was made concerning a spiritual matter, as to pay tithes or to marry, the breach thereof should be punished in the spiritual court; but not if it was upon a temporal matter.³ Again, in 22 Edw. IV., where an oath had been made for the payment of money, the same opinion was delivered; but the reason then given by Brian is, because an action would lie for the money at common law.⁴ These opinions seem only to confirm what had long since been delivered by Bracton.⁵

But notwithstanding these declarations of the judges, it is beyond question, that the courts ecclesiastical did *de facto* hold plea of breach of oath and of faith falsified, or *de fidei læsione*, as it was termed (which was considered by the canonists, in some respects, as the breach of a corporal oath) even when such oath or faith, voluntarily taken, was for confirming of a matter temporal: and this appears not only from the testimony of canonists, but from decisions in our courts of common law. It must be recollected how positively this object of jurisdiction is asserted by the constitution of Boniface, in the reign of Henry III., in which it is claimed absolutely, without any distinction whether the cause was spiritual or temporal,⁶ provided there was no mention of chattels. Such matters are also admitted to belong to the clerical judicature, by the statute *circumspectè agatis*, provided money was not demanded.⁷ Conformably with this last idea, it was held, in the time of Edward III. that though the ordinary, in such cases, could not enjoin the party to pay the debt according to his oath, yet he might enjoin him corporal penance;⁸ which opinion was confirmed by one in the 34 Henry VI., when it was held, that where a man bought a horse, and swore upon the Evangelists to pay £10 for it by such a day, if he broke his faith, an action of debt might be had at common law, and also a suit *pro læsione fidei* in the spiritual court; and

¹ 11 Hen. IV., 83.

² 38 Hen. VI., 29.

³ 20 Edw. IV., 10.

⁴ 22 Edw. IV., 20.

⁵ *Vide* vol. ii.

⁶ *Ibid.*, vol. ii.

⁷ *Ibid.*, vol. ii.

⁸ 22 Ass., 70. Fitz., Prohib., 2.

it was said, this would be no prejudice to the spiritual court, because the two proceedings were for different objects.¹ A new turn, however, was given to this doctrine by our courts of common law in the latter end of Edward IV.; for it was then declared by Brian and Littleton, without any one contradicting them, that *in lesione fidei* arising upon a temporal matter, the spiritual court might punish *ex officio*, but not at the suit of the party. This latter opinion was adopted in the next reign,² and is the latest opinion in our books of common law upon this famous question. It is thought the temporal judges required the proceeding to be *ex officio* rather than at the suit of a party, because it was presumed that the party would not prosecute merely for the punishment of the sin, but for pecuniary satisfaction for the injury.³

Lyndwood, however, seems to entertain no such distinction, but speaks as if the proceeding might be either way; and he gives the form of a libel, which he thinks so drawn as not to be liable to a prohibition; this we shall give the reader at length, not only to illustrate the present point, but as a specimen, and the only one, of pleadings in this court. The form of the libel is as follows: *A. proponit in judicio contra B. quoddam B. FIDEI SUÆ INTERPOSITIONE (or juramento suo medio) promisit et se astringit dicto A. decem libras tali die fideliter soluturum; quia tamen fidem (or juramentum) idem B. dicto die adveniente promissum suum hujusmodi non servando, sed contra illud temerè veniendo damnabiliter violavit, minus canonicè prætendens se dictæ fidei suæ (or juramenti) interpositione hujusmodi vinculo non ligari, cum re verâ fidei interposito (or juramentum) hujusmodi ipsum ad præmissa fideliter servanda, secundum jus divinum, et instituta canonica, sub pœnâ peccati mortalis effectualiter astringerit, et astringat. Quare factâ fide, quæ requiritur in hac parte, petit pars dicti A. per vos dominum judicem antedictum pronunciari, decerni, et declarari supradictum B. præfatæ suæ fidei interpositione (or juramenti vinculo) ad servandum et implendum promissa de jure divino, et juxta canonica instituta effectualiter, et sub pœnâ peccati mortalis astrictum et ligatum fuisse, et esse, nec non eundem B. fidem suam (or juramentum) hujusmodi temerè violâsse, ac pro violatione ipsâ canonicè puniendum fore, et puniri debere.*⁴

¹ 34 Hen. VI., 70.

² 12 Hen. VII., 22.

³ See An Apologie, etc., part i., 48–52.

⁴ Lynd., 315 o.

Thus far of offences of the first class; next as to those of the second, concerning which there is abundance of common-law testimonies. As to usury, we find it declared by stat. 15 Edw. III., c. 5, that the king should have conusance of usurers dead, and the ordinaries of such as were alive. This divided empire was noticed before from Glanville.¹

Notwithstanding defamation is mentioned in the statutes of *circumspectè agatis* and *articuli cleri* as an object of spiritual cognizance, without adding any qualification as to the nature of the defamation,² yet an exception had been lately introduced, similar to that which governed in many other points of disputed jurisdiction. It seems, from the tenor of Hankford's argument in the case of the vicar of Saltash, before quoted, that if the defamation arose on a temporal cause, it was held not to be cognizable in the ecclesiastical court.³ So in the reign of Edward IV. it was said, that where a person charged another with a robbery, the party defamed could not sue in the spiritual court, because he might have an action at common law; and where an action of trespass was brought for goods taken, and the defendant sued in the spiritual court for defamation, a prohibition was granted.⁴ There is also in the Register a prohibition to a suit for defamation, where a person had been a witness on an inquisition taken for the king, and the party affected revenged himself in this manner for the loss he thereby was likely to sustain.⁵ We have seen that a statute was made in the reign of Edward III. declaring that a prohibition should go to all suits for defamation against indictors.⁶

The laying of violent hands on a clerk was an offence that was expressly assigned to the cognizance of the spiritual court by the statutes of *circumspectè agatis* and of *articuli cleri*,⁷ and it now rested entirely upon the distinction there laid down; for it was held in 22 Edw. IV. that if a man beat a clerk, and he sued him in this court for his sin of excommunication, he did well; but if he sued there for amends, a prohibition would lie.⁸ That

¹ Vide vol. i.

² Ibid., vol. ii., c. x.

³ 2 Hen. IV., 15.

⁴ 18 Edw. IV., 6.

⁵ Reg., 42.

⁶ Vide vol. iii. Vide An Apologie, etc., 56.

⁷ Vide vol. ii., c. x.; iii., c. xii.

⁸ 22 Edw. IV.

sacrilege was both a spiritual and temporal crime, appears by some cases at common law of a very early date; where it is laid down, that in case of goods stolen out of a church or churchyard, the owner might sue for them in this court; the same of trees growing in a churchyard.¹ According to Lyndwood, this was now deemed both a spiritual and temporal crime.² Dilapidations were an object of spiritual censure; for in the time of Henry IV. it was held by Tirwhit, that if an ecclesiastical person made waste of a benefice, he should be deposed as a dilapidator of his church; and deposition was an act of the spiritual judge.³ We have the authority of Lyndwood for saying that incest, whoredom, and any incontinence, simony, usury, heresy, perjury, witchcraft, fortune-telling, drunkenness, and the like disorders and immoralities were crimes punishable in the spiritual court.⁴

Such was the mode of proceeding, and such were the objects of jurisdiction in our ecclesiastical courts. Ecclesiastical
courts. It is next to be seen what courts these were, and who presided in them. This, after what has already been said, need not detain us long. An English bishop, consistent with the scheme we have just given from the canon law,⁵ had spiritual jurisdiction through his whole diocese. The person who executed all of this charge which did not belong to the bishop by reason of his order, was called a chancellor; though it is remarkable that he is not so named in any of the commissions he holds, nor executes the proper duty of a chancellor. In early times, it is said that bishops had such an officer, who kept their seals. The chancellor of a bishop in this country usually holds two offices, that of *vicar-general*, and that of *official principal*; both which have been mentioned as appointments known to the canon law.⁶ The first was to exercise jurisdiction purely spiritual, as visitation, correction of manners, granting institution, and a general inspection and superintendence of things for the preservation of discipline and good government in the church. The business of the latter (in which we are more particularly interested) was to hear causes. Though these two offices have been usually granted together, yet there are in-

¹ 4 Hen. III. and 17 Hen. III. Fitz., Prohib., 14, 26.

² Lynd., 315 q.

³ 2 Hen. IV., 9.

⁴ Lynd., 96 o.

⁵ Vide c. xxv.

⁶ Ibid.

stances of vicars-general being appointed separately, upon occasional absence of the bishop; which, indeed, was the original design of such an establishment.

The authority of a chancellor, like that of his bishop, is generally given so fully as to extend over the whole diocese to all matters and causes ecclesiastical. But a bishop might create some exceptions to this general jurisdiction, by giving a limited one to a *commissary*. A commissary's authority was restricted to certain places, and to certain causes. These officers correspond with what the canonists called *officiales foranei*,¹ as if restrained *cuiusdam foro* only of the diocese. Another exception to the jurisdiction of the chancellor was that of an archdeacon. In some archdeaconries, partly by grants from the bishop, and partly by custom, the archdeacon exercises both spiritual and judicial authority; and this, as to causes and things, is of more or less extent in different places; and in some is peculiar and exempt from the bishop, in others only concurrent. But this limited jurisdiction of the archdeacon differs from that of the commissary, and also of the chancellor, inasmuch as he does not receive it by delegation, but has it *jure ordinario*, as ordinary; and where he does not preside himself, he appoints an official, who, from his restriction to certain places and causes, may be resembled to the commissary of the bishop. The title given to all spiritual courts was that of consistory.

Thus there was in every diocese a court held before the official principal of the bishop; and in some there was also one held by the bishop's commissary, and by the official of some archdeacon. Besides these, there were courts of the archbishops who had two jurisdictions; one diocesan, like the other bishops, the other was a superintendence over the bishops of their respective provinces. The Archbishop of Canterbury was considered as *legatus natus* in England.² He had five courts; the court of arches, two courts of peculiars, the court of audience, and the prerogative court. The former was usually held in Bow Church, called *ecclesia sanctæ Mariæ de arcubus*; and so from the church this court was called *curia de arcubus*; and it was held by the official principal of the

¹ *Vide c. xxv.*

² *Ibid.*

archbishop, called *officialis de arcubus*. The court of peculiars was held by the dean of the peculiars, having jurisdiction over the thirteen parishes called the peculiars of the archbishop in London: the dean used also to hold his court in Bow Church. The other court of peculiars was held by the same person by the title of *judge of the peculiars*, and he had jurisdiction over fifty-seven parishes lying in different dioceses and not subject to the bishop or archdeacon, but to the archbishop. The *court of audience* used to be held in the archbishop's palace before auditors, who heard such matters, whether of contentions or voluntary jurisdiction, as the archbishop thought fit to reserve for his own determination: they prepared evidence and other materials to lay before the archbishop for his decision. This was afterwards removed from the archbishop's palace, and the jurisdiction of it exercised by the *master*, or *official of the audience*, who held his court in the consistory place at St. Paul's. The great offices of the official principal of the archbishop, dean, or judge of the peculiars, and official of the audience, have since been united in one person, under the general name of dean of the arches, who is also vicar-general of the archbishop.¹ These courts are at present all held in Doctors' Commons, as is also the prerogative court by the judge of the prerogative court. This court was for the cognizance of all wills, where the testator having *bona notabilia*, the proof and administration, according to Lyndwood, belonged to the archbishop by a special prerogative.² The *curia de arcubus* was known under that name long before the reign of Henry II.

All suits were to be commenced in the court of the official principal of the diocese, unless the place where the cause of suit arose was within a peculiar and exempt jurisdiction, whether of an archdeacon or the archbishop; and then before the official of the former, or the dean or judge of the peculiars of the latter, as the case might be. There lay an appeal from the archdeacon or his official to the bishop, that is, to his official principal; and from the official principal of the bishop to the archbishop, that is, to his official principal; for the consistory of the official principal being in effect only the court of the bishop, the appeal, if to him, would be *ab eodem ad eundem*. From the

¹ Johns., 254, 257. Gibs., 1004.

² *Vide* c. xxv.

archbishop the regular course of appeal was to the pope. No appeal could be carried *per saltum* from the archdeacon to the archbishop; though a rule of the canon law, as we have seen, allowed such premature appeal to the pope in any stage of the proceeding.¹

Such were the ecclesiastical courts, and such their dependence on, and relation to, each other. Such they still continue, with very little alteration, except in the point of papal revision and control, which was taken away in the reign of Henry VIII.

The common-law jurisdiction, by which the spiritual court was controlled and circumscribed, seemed of late to be enlarging its powers of attack; Prohibitions. for prohibitions, which hitherto had been confined to the chancery and king's bench, were now held by all the judges of the common pleas, upon view of former precedents, to belong also to that court. But they made the following distinction between this court and the others: that in this there must always be an original writ depending for the same matter, otherwise they had no authority to prohibit: instead, therefore, of granting prohibition, as the king's bench, in the first instance, the course was to get an original writ of prohibition out of chancery, returnable in the common pleas, commanding the justices to make attachment. It was on the same occasion agreed that the common pleas had authority, in the like manner, to grant writs of consultation.²

The reader has been detained so long with the detail of the juridical system which prevailed in our Provincial constitutions. ecclesiastical courts at this time, that he will probably be content with a slight notice of what was done by the clerical legislature. Our attention has not been drawn to the transactions of the provincial synods, since we mentioned the constitutions of Archbishops Peckham and Winchelsey, in the reign of Edward I. From that period down to the present, the Archbishops of Canterbury had held many provincial synods, and made various constitutions therein. In 1322 a synod was held, and constitutions made by Walter Reynolds; in 1328, 1330, 1332, by Simon Mepham; in 1342 and 1343, by John Stratford; in 1351, 1359, and 1362, by Simon Islep;

¹ Gibs., 1036.

² 38 Hen. VI., 14.

in 1367, by Simon Langham; in 1378, by Simon Sudbury; in 1391, by William Courtney; in 1398, by Rodger Walden; in 1408, by Thomas Arundel; in 1415, 1416, 1430, 1434, and 1439, by Henry Chicheley; in 1445, by John Stafford. While the province of Canterbury was thus regulated by the care and industry of successive prelates, there appear no provisions made for the like purpose by the archbishops of the other province, except the constitutions of William de la Zouche in 1350; those of John Thorsby in 1363, which were partly a republication of those of the former prelate; and those of John Kemp in 1444, which were partly transcribed from some of Winchelsey's in 1305. This seemed a defect in the clerical polity; to remedy which, and to reduce the order, discipline, and judicature of the national church to some uniformity, it was provided in 1462, in a convocation of the clergy of York, held by William Booth, that the effect of the constitutions of the province of Canterbury, had, and observed, and being nowise repugnant or prejudicial to those of York, should be admitted into that province, but not otherwise, nor in any other manner; and for that purpose should be inserted and incorporated with them.¹ Thus was a body of national canons collected for the observance of the whole kingdom. As matters of discipline were firmly settled according to the Romish scheme, and the principal opposition to it, which had been raised by Wickliff's followers, was now silenced, the convocations had little of moment to engage their attention; and we accordingly find nothing of importance added to the above body of constitutions. The whole of these, from the time of Lanfranc as far down as 1430, were digested and commented on by Lyndwood, and in that form presented a valuable depository of English ecclesiastical law.

There is no mention that the first of the kings whose reigns we have now been reviewing took any personal concern in providing for the improvement of our law, or showed any remarkable regard for it (a). The following facts related of Edward IV. place

The king and
government.

(a) Any man might have an "attorney-general," which meant originally

¹ Johnson's Canons, vol. ii., 1463.

him in a different light. It is said by the writer of the History of Crowland Abbey, that this king went in per-

an attorney authorized or appointed to sue generally, and not merely in particular matters (*Year-Book*, 39 *Hen. VI.*, fol. 32). In the patent rolls (11 *Henry IV.*, *Rot. Parl.*, 237), "W. attornatus regis in communi banco et in aliis curis locis quibuscunque ad placitum regis" (*Rot. Parl.*, 237). "Thos. Tykall attornatus domini regis in communi banco, et in omnibus aliis curio quam diu se bene gessent" (*Rot. Parl.*, 256). The character of this king's rule has already been described. That rule was as perfectly absolute and as entirely arbitrary as any rule could possibly be; and it will appear, upon a little attention, manifest that the accession of Edward IV., and not of Henry VII., was the true era of the rise of arbitrary power in this country. No doubt the policy of arbitrary power was more persistently pursued and thoroughly carried out by the sovereigns of the Tudor dynasty; but it was begun in the reign of Edward, and his successors, either of his own or of the succeeding dynasty, had only to pursue the same policy, and by the same means. That policy, and the means by which it was carried out, might be described by one word—*terror*. The reign of Edward was neither more nor less than a reign of terror, and that reign of terror was kept up by his successors. It was a reign of terror established by means of arbitrary executions, which could not have been ventured upon by a sovereign whose power was not entirely absolute and arbitrary. And from his accession to the end of the long reign of Elizabeth, there was scarcely a year during which that reign of terror was not kept up, and there was no time during which any man's life was safe who durst oppose the will of his sovereign. Throughout that long period, a period of about a century, hardly ten years elapsed without some terrible arbitrary execution, to strike terror into men's minds, and appal them with the thought of the frail tenure upon which they held their lives. It has been seen that Edward, not only upon his accession, but some time afterwards, sought to terrify the nation into submission by numerous executions under martial law. Some years afterwards there came the dreadful deed, the murder by the king of his brother, by means of that terrible engine of destruction, a bill of attainder—the worst, if not the first, instance of that dread power, so often afterwards to be fatally abused. "The blood which he shed," says the learned Lingard, "intimidated his friends no less than his foes, and both lords and commons during his reign, instead of contending, like their predecessors, for the establishment of rights and the abolition of grievances, made it their principal study to gratify the royal pleasure" (*Hist. Eng.*, vol. iv., c. 2). And the historian adds in a note, "We shall search in vain on the rolls for such petitions as were presented to the throne by the commons in former reigns" (*Ibid.*). Hence "Every opposition to his government was suppressed almost as soon as it was formed" (*Ibid.*). It was naturally considered that a monarch who would not spare his brother, would not be likely to spare any subject; and the subservient parliament had already attainted a host of those who were obnoxious to him, and were ready to attain any others at his bidding. His ministers were men who had been already attainted, whose lives were in his hands, and who could only obtain mercy by subserviency. Thus it was with Morton, afterwards cardinal and chief minister under Henry VII., and thus it was with Fortescue, who had been lord chief-justice under Henry VI. The change which had taken place, and the contrast between the spirit of the last reign and the present, cannot be better illustrated than by a passage from his treatise *De Laudibus Legum Angliæ*, written during the last reign, and the system of rule established with his assent. In that treatise he had laid down that the English was not an absolute, but a limited monarchy. "The former," he

son with the judges to try criminals in different parts of the kingdom; *nemini, etiamsi domestico suo, parcens, quò minùs laqueo penderet, si in furto vel latrocinio deprehensus fuerit.*¹ We are told, also, that in the second year of his reign he sat three days together, in Michaelmas term, in the court of king's bench; to which attendance he was excited by a strong desire, it is said, to understand the law.²

The king's attorney was the only law officer of the crown of that kind till the reign of Edward IV.³ In the first year of that reign we find Richard Fowler was made solicitor to the king, and in 11 Edward IV., William Husee⁴ was appointed attorney-general in England (the first mention we have of this title): *attornatus generalis in*

said, "was the offspring of force and conquest, so that the will of the prince was law; but in the latter, which arose from the free will of the people, the king could not make laws, nor take the goods of his subjects without their consent" (c. 9, 14). Edward, however, reigned as an absolute sovereign — a reign of terror was established. This reign of terror was maintained by trials and executions for treason, on mere proof of words spoken against the title of the king (*State Trials*, i., s. 94; *Cro. Car.*, 120); and he was enabled to maintain it the more easily by reason of the entire prostration of the aristocracy through the long wars of the Roses. The disastrous results of these wars form the key to the legal history of this reign. The aristocracy being prostrated, and constitutional guarantees entirely absent, the people were at the mercy of the crown, and mere misdemeanors against it were punished with cruel and illegal severity. How terrible his rule was, a single incident will illustrate. "In the time of Edward IV., one Davis struck one with his fist in Westminster Hall, during the sitting of the court, and threatened to hang him if he gave evidence against such a felony; for which, upon indictment confessed, he was adjudged to perpetual imprisonment, to forfeiture of lands, tenements, and goods, and to have his right hand struck off at the standard in Chepe" (*Dyer*, 188). Such things were done in England so long after the Great Charter, and in utter violation of its fundamental provision that no man should lose life or limb save by the judgment of his peers or the law of the land. It need hardly be said that there was no pretence of legality for a sentence of such cruelty. The utmost that could be legal was fine and imprisonment, both to be moderate, according to the provisions of the charter. It is very observable how the precedents of cruelty and tyranny thus set were afterwards followed by the sovereigns of the Tudor dynasty. The very sanguinary punishment just narrated as inflicted contrary to law under Edward IV. was actually enacted into law under Henry VIII.; and Edward's successors only followed his example in establishing a reign of terror by means of executions under bills of attainder. There is, indeed, a striking resemblance in this respect between the reign of Edward IV. and Henry VII., or Henry VIII., and they have this further resemblance, that the rise of royal absolutism under Edward was marked by a disposition to assert that supremacy, even in ecclesiastical affairs, which was established under Henry VIII.

¹ Gale, vol. i., 559. Bar. Stat., 419.

³ Dugd., Chron. Series, 69.

² Truss., Cont. of Dan., 184. Bar. Stat., 429. ⁴ Ibid., 71.

Angliâ cum potestate deputandi clericos ac officarios subse in qualiter cunque curiâ de recordo (a). This officer used to be appointed for life.

Though the House of Commons had acquired a great weight in the constitution during the previous reigns, particularly under the house of Lancaster, there is no mention of their having concerned themselves in parliamentary judgments of life and death. But at length a politic prince found it convenient to make one of them, to give color to the prosecution of a great and obnoxious man, and by that measure paved the way for fixing the commons on this legislative right. This was in the proceedings against the Duke of Clarence, in the 17th year of Edward IV. What makes this more remarkable is, that it was at a time when the Steward of England presided, and the lords might seem to be no longer acting in their parliamentary character, but simply as a court. The king, on this occasion, was in the house, and appeared in the light of a prosecutor, for he was the person, and the only one, who enforced the charge against the duke. Some evidence was produced. The House of Lords were of opinion that the evidence was sufficient, and therefore proceeded to condemnation, the Duke of Buckingham, for that time high-steward, pronouncing the sentence; but the execution was delayed. The charge against this unhappy prince was that of treason, with the overt acts of using incantations and spreading reports of the king's illegitimacy; but his principal crime was aspersing the judges and juries who had concurred in the condemnation of Burdet and Stacy, two of his friends.¹ The king resolved to make this blow at his brother's life as sure as possible, thinking, perhaps, that the charge of treason was so slight as to need something extraordinary to give effect to it, or because the opinions of people had taken another turn upon this point of parliamentary jurisprudence. Whatever the cause, the king took the following measure: he

(a) The appointment of these law officers of the crown marks an important era in the history of our law, and, in itself, would serve to characterize the reign as the era of the full and effective enforcement of the claims of the crown, and the consequent progress in the development of the royal prerogative, and its rapid rise to that absolute supremacy which, in the next reign, marked the establishment of arbitrary power. Husee (or Hussey) was chief justice under Henry VII.

¹ *Rot. Parl.*, vol. vi., 193.

directed the speaker of the House of Commons and the members to be called before the other house, where a rehearing of the whole matter was had in their presence. After this sanction, it was thought the duke might be executed with safety, which was accordingly done.

We do not find that any formal act was made to testify the concurrence of the whole parliament in this judgment of attainder; however, the precedent of calling in the House of Commons to assent to a prosecution and sentence must have had a great effect towards encouraging them in maintaining this claim. The notions of what was law and what was legislation had become too well settled and distinguished for it to be longer endured that the law should be altered by any judgment less than a legislative act, or that any transaction should have the force of an act which was not assented to by the whole parliament. The commons, by repeated revolutions in the government, had now risen to such importance that they could be no longer overlooked. These considerations had operated so far in the time of Richard III. that he ventured to make no judgment by the assent of the lords alone, either on petitions in private matters, or in the prosecution of offenders; but, in both cases, the aid of parliament was only to be obtained by a formal and complete act of the legislature. These, from the particular occasion of them, were called private acts.

Several attainders and several alterations in property were made in the short reign of that usurper by these private bills, and this example was followed in the succeeding reigns. Thus have we seen the original judicature of parliament, which at first resided in the king and lords, participated by the commons, and at length become a mere act of legislation. The remaining judicial authority which they still retained was that of a court of error, and of being their own judges in cases of life and death, and of deciding on impeachments by the House of Commons.

Littleton was a judge of the common pleas in the reign of Edward IV., and composed his book of Littleton. Tenures for the use of his son, to whom it is addressed. It contains three books; the first upon estates; the second upon tenures and services; which two were designed to explain more at large the principal subject of the old book of tenures: the third discourses of several

incidents and consequences of tenures and estates. This little treatise has acquired more notice than any other book in the law; which is to be ascribed partly to the nature of the subject, partly to the manner in which it is treated, and partly to the great character of the writer when a judge.

The learning of real property had in the reign of Edward III. been cultivated with a minute attention: the period which had elapsed from that reign to the time when our author wrote, had produced many additions and modifications of it, till this branch had grown into a very refined system, constituting, in every respect, the most intricate part of our jurisprudence. These later determinations had rendered the old treatises of the law in a great degree obsolete. Bracton, though more full than any of the rest, being more ancient, afforded no light in that sort of questions which were now usually canvassed, and many of which had originated entirely since his time: still less was to be expected from Fleta, Britton, and *The Mirror*, though of a later age. In this state of things, it was an undertaking much to be wished, that some one should explain in a methodical way the new learning that had arisen on the subject of tenures and estates. This our author has done, with a felicity which has placed him in a rank above all writers on the English law.

If we inquire what is the excellence which has entitled this writer to so high a character, it will be found to be of a particular kind. It is not an accurate arrangement of his subject; not a remarkably apt division of his matter; not a strict adherence even to his own plan, by preserving a close connection between the matter and title of a chapter: in all which he is sometimes more defective than writers of inferior note: the excellence of Littleton seems to consist in the great depth of his learning and simplicity of his manner; in a comprehensive way of thinking, and a happy method of explaining; with a certain plainness yet significance of style that is always clear and expressive.

This author usually quotes no authority for what he advances. In this, however, he does not differ much from his contemporaries, who, even in their arguments and opinions delivered in court, had not got into that practice of vouching authorities which has obtained so much since.

Whenever he has a point to handle which is not thoroughly settled, he generally states the different opinions on it, and then gives his own reasons for differing or agreeing with either: and where he does not deliver an opinion declaredly his own, the last is supposed to be that which he is inclined to adopt. This open and candid way of discussing, added to the known abilities of the author, acquired him great confidence with posterity: anything out of Littleton has been usually taken upon that authority alone. Thus, the want of references, which at first might seem a want of authenticity, has in the end administered to the fame of this writer; as opinions which otherwise might be vouched from an adjudged case, are now wholly rested on the words of Littleton.

The undiminished reputation which this author still possesses is owing principally to the choice of his subject. The law of tenures and estates, as understood in the time of Littleton, is at this day the best introduction to the knowledge of real property; and though great part of this volume is not now law, yet so intimately was the whole of that system connected, that what remains of tenures cannot be understood without a knowledge of what is abolished; and therefore the parts of Littleton which are now obsolete, are studied both with profit and pleasure. We may still say what the author pronounced of his work in another respect: "Though certain things which are moved and specified in the said book are not altogether law, yet such things shall make thee more apt and able to understand and apprehend the arguments and reasons of the law."¹

Besides this, the law of tenures and estates has always been thought the most natural entrance into the study of the law in general; this small volume, therefore, became the first book which was put into the hands of the student; and while it was considered by practisers and the courts as a work of the highest authority, it was at the same time the institute to English jurisprudence. Lawyers gave their earliest and latest application to the text of Littleton: every section and sentence was weighed, and every proposition considered in all its consequences; it was translated, commented, analyzed; every method

¹ Litt., Epilog.

was contrived to gain a complete knowledge of its contents. Perhaps no book, in any science so confined as the municipal laws of any country must be, has more employed the labors of the learned and industrious. A writer, who was himself one of the greatest ornaments of the law, and whose name never appears greater than when accompanied with that of our author, furnished the world with a very copious and minute commentary on this book: in which he has carried his attention to the import of every word so far as to make interesting remarks on his very *et cæteras* (a). The fame of Littleton has not been confined to this island. As the Norman lawyers made Glanville a model upon which to form their *coutumier*, and give system to their jurisprudence, a modern writer of that country has lately composed a comment on Littleton, as the best help towards illustrating the customs and laws of that duchy.¹

The learning of the law was thrown into a more methodical form than it had ever yet received, by Statham, who was a baron of the exchequer in the time of Edward IV. This was in his *Abridgment of the Law*; being a kind of digest, containing most titles of the law, arranged in alphabetical order, and comprising under each head adjudged cases, abridged from the Year-Books in a concise manner. The plan of this work was entirely new, and conceived with some judgment, though the execution was imperfect, and left open to improvement. The cases are strung together with reference to nothing but the time of their adjudication, without any regard to the connection of their matter. With all its incompleteness, this must have been a very valuable work at the time it was com-

(a) This, it need hardly be observed, is an allusion to the celebrated work of Coke upon Littleton — the greatest text-book in our law — and, with Mr. Hargreave's learned notes upon it, forming a mine of legal learning, connecting together the old law with the modern.

¹ This commentator is M. Howard, advocate of the parliament of Normandy, whose edition of our older law tracts we have had occasion to consider in another place. *Vide* vol. ii., 360, in the notes. It is unnecessary to add anything to what we there threw out with regard to this gentleman's qualifications to compose commentaries upon our laws. Upon the whole we are obliged to this foreigner; for if no English lawyer would write such observations upon Littleton, none would be at the pains to give us a new edition of Fleta, Britton and the *Mirror*, with emendations of the numberless errors in their texts. The latter work will always be of use to the common lawyer, and the former is such as will never mislead him.

piled, when the helps to the law were few and confined. This "Abridgment" has served as a model to others in later times; which, without the merit of originality, have surpassed their master's performance in method, precision, and extent. This work had the fate to be of less use than, perhaps, any performance that, in the nature of it, seemed to aim at such general utility. It is very doubtful whether it was printed before Fitzherbert's "Abridgment," which came out in 1514; and whether it was printed a little before or a little after, the need of it was entirely superseded by the latter work.

Somewhat prior to these, a work of a more extensive, certainly of a much more difficult and laborious nature, was produced on the subject of our ecclesiastical law. This was the *Provinciale* of William Lyndwode, official principal to Archbishop Chicheley. The learned canonist has here digested under heads the substance of almost every constitution made in synods of the province of Canterbury, from the time of Stephen Langton down to Archbishop Chicheley. The method he has taken is that of the decretals of Pope Gregory IX., so justly esteemed the most systematic and valuable part of the canon law. To this digest he has added a very copious and minute comment, replete with every illustration that could be furnished from an intimate acquaintance with the writings of foreign canonists, and a long experience in our own ecclesiastical courts. The comprehensiveness of this, as well as the merit of its execution, has contributed to place Lyndwode much above his predecessor John de Athona, who had led the way in this walk of study, by his gloss on the legatine constitutions of Otto and Ottoboni. With this distinction in favor of Lyndwode, these two writers have obtained great authority with posterity; they are regarded both in the spiritual and temporal courts as containing undeniable evidence of the practice and law of their respective periods; and as they were instrumental in fixing both in after times, their works are considered as the depositories of the common law of the church and of the ecclesiastical courts.

Lyndwode, in following the arrangement of the decretals, has been thought to sacrifice perspicuity to method, for that the matter of our constitutions does not fall easily into the order into which he has endeavored to force them.

His style of commenting likewise is not less liable to exception. Surely no one was so apprehensive as he appears, lest a word of his text should pass without being thoroughly understood.¹ Every term has its comment; and rather than not say something, he too often indulges himself in unnecessary remarks and digressive details. This makes his gloss extremely minute and desultory; so that to read it at length is tedious, and to search for information on a particular point, is generally a fruitless labor. Notwithstanding these defects in Lyndwode, which, too, perhaps, were the literary failings of the age in which he wrote, his labors have not been surpassed by any of superior ability or industry in later times. The pages of this old writer, and the still older whom we have just mentioned, continued for many years the only testimonies of our ecclesiastical law. To methodize or illustrate the existing materials, or add to them by making public reports of adjudged cases, are the two ways of promoting legal knowledge; in one of which the practisers in our ecclesiastical courts have done very little, and in the other nothing at all; so little did they improve the advantage given by Lyndwode over the common lawyers, who at that time had nothing of equal extent and utility on the practice of their courts.²

The art of printing being introduced into England by Caxton about the close of this period, we are naturally led to inquire what use was made of it towards propagating a knowledge of our laws and constitution; but such has been the carelessness of that age, or the destruction of time, that nothing very authentic can be obtained on this subject. The first book known to be printed by Caxton, in England, was the "Recuyel of the Historyes of Troy," in 1471. While his press was employed in multiplying copies of Reynard the Fox, the Death of King Arthur, the History of Charles the Great, and other popular fables, and histories worse than fables, there is no proof that the profession of the law were indebted to him for one printed book. There is a copy of Lyndwode's *Provinciale*, which having Caxton's mark, and

¹ Gibs. Pref., 19.

² This is said upon a supposition, that by the lapse of two hundred years, and the changes that had taken place in our law, Bracton had ceased to be of that use to practisers which he otherwise would have been.

Wynkyn de Worde's colophon, was certainly printed by the latter. The statutes of Richard III., without name or date, though usually attributed to Caxton, are equally doubtful. The same may be said of the stat. 1, 2, and 3 Hen. VII.¹ The printers next in point of time were Lettou and Machlinia; who are supposed to have been Caxton's servants, and had begun to print for themselves in partnership in the years 1480 and 1481. There is an edition of Littleton's Tenures, printed by these printers, without a date; and this book is supposed to have been put to press by the author himself, who died in 1481. There is a book entitled "*Vieux Abridgement des Statutes*," which, from the types and marks, is supposed to have been printed at the same press and at the same time. These may therefore be considered the first printers of law; though they had no patent or special authority for so doing. Some books are found with Machlinia's name singly, and others are thought to be his from comparing the letter and work: of the former kind, is the Year-Book 34 Henry VI.; of the latter is the 33d, 35th, and 36th years of the same king.² To these may be added the statutes of the first year of Richard III.³ (a) About the same time some statutes were

(a) This, and the fact that in this reign the first statutes and law-books were printed, would alone render this reign an important era in our juridical history. The Year-Books had existed, and so had some treatises on the law; but in this reign the Year-Books were first printed, and the great text-books of Littleton on the common law and Lyndwode on the ecclesiastical law were first published. These two names in themselves—Littleton and Lyndwode—would seem to signalize this reign, and mark a great era in the history of our law. As already observed, the reign of Richard III. is regarded, for the purposes of legal history, as a continuation of that of Edward IV.; and it has been shown in the opening note to chap. xxiv., that the reign marked the rise of absolute regal power. That, coupled with the great development of secular law arising from the prevalence of peace, and the application of printing to the diffusion of law-books, are the great facts of the era, and prepared the way for the next. This reign was distinguished by its having witnessed the last claim of villenage. It was a claim made by the Bishop of Ely against one Huston, whom he sought to seize as his villein; whereupon Huston, who happily escaped actual seizure, brought his special action in the case against the bishop, for claiming him as his villein, *et auxy gisant en agait de luy prendre*. But as the bishop himself got into trouble, and his temporalities were seized into the king's hands, the suit was stayed (*Year-Book*, 2 Rich. III., fol. 14). Among the cases of the reign was also one of ravishment of ward; that is, unlawfully taking him away from his feudal guardian, or rather the person who had the right to feudal profits of the wardship; for there was little in it of guardianship to the ward, and it was looked upon chiefly as a source of

¹ Typog. Antiq., pp. 98, 101, 104.

² Ibid., 111-113.

³ Ibid.

printed under the title of *Nova Statuta*, containing the statutes concerning the Despencers, those of Edward III., Richard II., Henry V., Henry VI., and those of Edward IV., down to the twenty-second year. All the foregoing books were in folio.¹ All Richard's statutes are in English (a)

profit to the lord. Henry Danvers brought writ of ravishment of ward against Richard Pole, knight; and counted that one R. David, knight, held a manor of the Abbot of Malmsbury, by service of chivalry (*i. e.*, knight-service), and had an estate to him and his heirs, and conveyed the tenancy of the manor to one Stradling, grandfather of the infant, who had been seized by the abbot, who had granted the wardship to the plaintiff, out of whose possession the defendant had taken him. The defendant pleaded that the ancestor of the infant held the manor in socage, and seized the infant as guardian in socage, which was the issue tried (*Year-Book*, 2 *Rich. III.*, fol. 13). At this era the cases as to forcible entry were very frequent and characteristic of the age, still marked by much violence and turbulence, showing the necessity for a stern and effective administration of justice and execution of the law. The sheriff, by the common law, could take a great number of men to assist him (*Brooke's Abridgment*, 8, citing 22 *Hen. VI.*, 37); and on the statutes the party could always have restitution (*Ibid.*, 16; 7 *Edw. IV.*, 18). And if one held a house or land with force, a justice of the peace could remove the force (*Ibid.*, 19; 21 *Hen. VI.*, 5). And it was laid down, that if a man came with many who were accustomed to attend upon him, it was force (*Ibid.*, 30; 10 *Hen. VII.*, 72). In the *Paston Letters*, about the same period, are instances of much more actual force, and of the use of arms, and laying a regular siege to mansions the possession of which was in dispute.

(a) The statutes of Richard have already been noted in the first chapter of this volume. They were few, but important; and Lord Bacon observes that he was a good law-maker. The *Year-Book* of his reign also shows that he took a great interest in the administration of justice. The "king came into the inner chamber, called the star chamber, and before all his judges propounded three questions—1. If a man falsely sued out a writ against another, upon which he was arrested, and he died in prison, whether there was any remedy; to which they answered in the negative. 2. If a judge took (*i. e.*, by mistake) a bill of indictment not found by the grand jury, and enrolled it among the others duly found, whether he was liable to any punishment; to which they replied that he was not, as a judge could not be punished for anything done by him judicially, though others qualified it thus, provided it was done innocently—*ignoranter et pro defectu scientiæ*, as occurred, they said, in the case of the Abbot of Crowland, who, under color of the franchise of infangthief, adjudged a man to death against law, for which indeed the franchise was forfeited, but no other penalty incurred—a highly sensible and very important judicial determination. The third question related to the erasure of a record, as to which it is stated that there was a commission (*i. e.*, of oyer and terminer) to Newgate; and Hussey, C. J., Brian, C. J., and Starkey, J., the recorder came to Guildhall, and the man was indicted before them, and error was assigned, for that the mayor ought to have been the principal in the commission" (*Year-Book*, 2 *Rich. III.*, fol. 11). This case is cited by Lord Hale as good law, to show that in such commissions the mayor ought to be of the quorum (*Pleas of the Crown*, vol. ii., p. 44). Such commissions were constantly issued, and the judges were

¹ Typog. Antiq., 114, 115.

and so they continued to be observed in all subsequent periods.

called the justices at Newgate (*Year-Book*, 4 *Edw. IV.*, fol. 11). But as the original jurisdiction was in the mayor, whose legal assessor was the recorder, the latter always sat, and prisoners were arraigned before the king's judges and the recorder (*Year-Book*, 2 *Edw. IV.*, fol. 22). It is stated that Edward IV. had granted a charter to the city, which vested the judicial government in the mayor, the recorder, and the aldermen (*Thomson's Notes on the Charters*, p. 189). So that when the king's judges were joined in the commissions, the mayor always came first (*Mackally's Case*, 9 *Coke's Rep.*, 2; *Lord Sancar's Case*, *ibid.*, p. 115), and the aldermen were called their fellows (*Ibid.*), and sentences were passed by the recorder (*Ibid.*). There were cases in these reigns whence it appears that the jurisdiction under commissions of oyer and terminer depended rather strictly on their terms, and that a commission to two or three could only be executed by them all (5 *Long Quinto*, fol. 130). And in cities the mayor was always joined (*Year-Book*, 2 *Rich. III.*, fol. 9). The whole subject of criminal judicature was now attended to more carefully than it had been, and local criminal jurisdictions — except under commissions from the crown — died out. It has already been shown that the authority of the crown was greatly strengthened in this age by the union of power and title in the accession of the house of York, whose title was firmly and finally recognized by parliament (1 *Edw. IV.*, c. i.; *Rot. Parl.*, vol. v., fol. 463), and was not disputed by Henry VII., who, on the contrary, having gained the crown by force of arms, and conscious of the weakness of his title, sought to acquire a title for his heirs by his marriage with Elizabeth of York (*Vide Life of Henry VIII.*).

CHAPTER XXVII.

HENRY VII.

ATTENDING THE KING IN HIS WARS—VAGRANTS—CORPORATIONS—
STATUTE OF FINES—STATUTES OF PERNORS OF PROFITS—ALIENA-
TIONS OF JOINTRESSES MADE VOID—SUITS IN FORMA PAUPERIS—AT-
TAINTS—STEALING WOMEN—THE STAR CHAMBER NEW-MODELLED—
INFORMATIONS AT THE ASSIZES AND SESSIONS—APPEAL OF MURDER—
BAILING FELONS BY JUSTICES OF THE PEACE—BENEFIT OF CLERGY—
BARGAIN AND SALE—OF USES—COVENANTS TO STAND SEIZED—
EJECTIONE FIRMÆ—ACTIONS OF ASSUMPSIT—THE CHANCERY—OF
TREASON—LARCENY—SANCTUARY—KING AND GOVERNMENT—
PRINTING OF LAW-BOOKS—MISCELLANEOUS FACTS.

THE reign of Henry VII. exhibits some remarkable in-
stances of innovation upon the old law. The benefit
of clergy was taken from offenders of a certain descrip-
tion, and regulations were made for qualifying that an-
cient exemption, so as to promote a better administration
of criminal justice (*a*). Among the decisions of courts,

(*a*) The author here mentions almost the only innovation made by legisla-
tion in this reign, and the statement with which he commences is one of the
erroneous traditions of our legal history. The great feature of this reign was
not in novel or original legislation, but rather in measures to enforce the
execution of the existing laws, and all the new legislation of the reign will
be found directed to that object, and designed to secure the maintenance of
peace, and the ascendancy of the royal power. The king himself gave this
as the character of his policy, and declared at the outset of his reign that
there were plenty of excellent laws, and that all that was wanted was that
they should be executed. But that was a policy which had been commenced
in the reign of Edward IV., under whom peace had been maintained and
law upheld and developed for more than twenty years; and in the brief
reign of his successor, Richard, were passed two important measures as to
uses and fines, which formed the basis for the measures upon those subjects
passed in the present reign. There was no such alteration in this reign as
to the remedies for the recovery of real property, as the author above sup-
poses, and, on the contrary, an alteration he does not mention did take place,
arising out of the frequency of forcible violations of right, and the conse-
quent prominence given to remedies for the suppression of force. Of the
measures above mentioned as distinguishing this reign, none really belonged
to it save that as to privilege of clergy, and that which first gave the
authority of statute to the arbitrary jurisdiction of the Star Chamber; and
the author has omitted to mention, in the above summary of the distinctive
measures of the reign, one of the most important and characteristic, which he
afterwards cursorily mentions with an inadequate and erroneous impression

there was one concerning the action of ejectment, which had the effect of bringing about a considerable change in

of its scope. All the measures peculiar to the reign will be found pervaded by the same spirit, and directed to the same object, the supremacy of royalty. The spirit and policy of the reign were significantly indicated by one of the first of its acts recorded in the Year-Books, where we read: "The justices were at Blackfriars, upon the matters brought by the king before parliament, and there were moved many good statutes, profitable to the realm, *if they could be executed*. And there were those statutes which had been composed in the time of Edward IV., and sent in each county to the justices of the peace, for them to proclaim and execute — *i. e.*, Winchester and Westminster — for robberies and felonies, the statute of riots, routs and forcible entry, the statutes of laborers and vagabonds, and of signs and liveries, and of maintenance and embracery. And they agreed that the statutes were sufficient, and if they were *executed*, the law would well have its course; *but how they could be executed?* — that was the question. And the chief-justice said that the law could never be well executed until all the lords, spiritual and temporal, should, from the love and dread of God, or of the king, or both, be resolved effectually to execute them; and then, when the king, of his part, and the lords, of their part, were willing to do it, and did it, others would do so, and if not then, they should be punished. And he said that in the time of Edward IV., when he was his attorney (*i. e.*, attorney-general), all the lords swore to keep those statutes, with others, and effectually to execute them. And that, nevertheless, afterwards, in the Star Chamber, it appeared that certain of the lords made retainers, directly contrary to these laws and oaths; and he said that these oaths and laws were of no avail, and he had said so to the king himself" (*Year-Book*, 1 *Hen. VII.*, fol. 1). Now all the measures of the reign, save such as merely amended or added to laws already existing, will be found directed with great consistency to that object — that is, to strengthening the executive power, and enforcing the execution of the laws. The king's own idea of the condition of the realm and the policy it required will be found abundantly and significantly indicated in the preambles and recitals of several of the statutes passed in the earlier portion of his reign, and purporting to have been framed and passed under his special and personal auspices. And the language of these recitals also illustrate the spirit of the reign, and not only of the reign, but of the dynasty, as referring everything to, and deriving everything from, the royal authority. Thus the act in the fourth year, directing that all justices of the peace shall execute their commissions, redress injuries, and maintain the laws, thus recites the grounds and reasons for its enactment: "*The king, our sovereign lord, considereth that, by the negligence, misdeameaning, favor, and other inordinate causes, of justices of the peace in every shire of this his realm, the laws and ordinances made for the politic weal, justice, peace, and good rule of the same, and for the perfect surety and restful living of his subjects of the same, be not duly executed according to the tenor and effect that they were made and ordained for; wherefore his subjects have been grievously hurt, and out of surety of their bodies and goods, to his great displeasure.*" So the act as to the Star Chamber recites that, by unlawful maintenance, giving of liveries, retainers, and other embraceries of her subjects, the policy of the realm is most subverted (3 *Hen. VII.*, fol. 7). Hume rightly quotes this as most remarkable, and as showing the state of the realm at the time, and both he and Sir J. Mackintosh agree that it really was so. Now this, it will be observed, was an executive rather than a legislative policy — that is, it was a policy which attached more importance to the strengthening the executive power, and enforcing the execution of the laws, than to any *alteration* of the

the course of legal remedies for recovering land. These were perfectly novel, and gave rise to a new set of princi-

laws. It pointed far more to the rigid exertion of the *executive* power than to any exercise of the *legislative* power in the state, and had its origin in a profound sense of the futility of the best and wisest laws, unless they are supported and executed and carried out by a strong executive. It is this, and not in any novel or original schemes of legislation, which characterized and distinguished this important reign. It was the era of the establishment of the executive power on a firmer and more effective foundation than it ever before attained. "Whatever," says Hume, "may be commonly imagined, from the authority of Lord Bacon, and from that of Harrington and later authors, the laws of Henry VII. contributed very little towards the great revolution which happened about this time in the English constitution. The practice of breaking entails by a fine and recovery had been introduced in the preceding reigns, and this prince only gave indirectly a legal sanction to the practice by reforming some abuses which attended it. But the settled authority which he acquired to the crown enabled the sovereign to encroach on the separate jurisdiction of the barons, and proceed to a more general and regular execution of the laws" (*Hist. Eng.*, vol. v., Append. iii.). "There were," the acute historian observes, "many peculiar causes in the situation and character of Henry VII. which augmented the authority of the crown, and most of these causes concurred in succeeding reigns, and (it may be added) had commenced in the preceding reign of Edward IV." There can be no doubt that the country had now entered on a new era in its constitutional and legal history. "The Norman Conquest," observes Hume, "threw more authority into the hands of the sovereign, which, however, admitted of great control, though derived less from the general forms of the constitution (which were inaccurate and irregular) than from the independent power enjoyed by each baron in his particular district or province. The establishment of the Great Charter exalted still higher the aristocracy, imposed regular limits on royal power, and gradually introduced some mixture of democracy into the constitution. But even during this period, from the accession of Edward I. to the death of Richard III., the condition of the commons was nowise eligible; a kind of Polish aristocracy prevailed; and though the kings were limited, the people were as yet far from being free. It required the authority, almost absolute, of the sovereigns, which took place in the subsequent period, to pull down those disorderly and licentious tyrants, who were equally averse from peace and from freedom, and to establish that *regular execution of the laws* which, in an after age, enabled the people to erect a regular and settled plan of liberty" (*Hume's Hist. Eng.*, c. viii., p. 23). It has already been seen, indeed, that this era, the era of a regular execution of the law, had already been entered upon in the reign of Edward IV., and that the historian, following Lord Bacon, placed it too late in representing it as having begun in this reign. It was not, however, it is to be observed, a regular execution of the law as against the *subject*; for it arose entirely out of the ascendancy of the *royal power*, rather than of law. This ascendancy had been acquired by Edward IV., and it was only continued by Henry VII., under circumstances peculiarly favorable to the growth of arbitrary power. True, as his accession was the commencement of a dynasty which carried out arbitrary power more persistently than it ever had been before, this reign, properly enough, marks the era of arbitrary power in the history of our law and constitution. "There were many peculiar causes in the situation and character of Henry VII. which augmented the authority of the crown. Most of these causes concurred in succeeding princes, together with the factions in religion, and the acquisition of

ples and ideas in the law of property and of crimes. Other productions of this reign, though only modifica-

the supremacy, a most important article of prerogative" (*Hume*, vol. v., App. iii.). Various causes diminished the influence of the aristocracy, anciently so formidable to the crown. The prince, who in effect was the same with the law, was implicitly obeyed; and though the *further* progress of the same causes begat a new plan of liberty, founded on the privileges of the commons, yet in the interval between the fall of the nobles and the rise of this order, the sovereign took advantage of the present situation, and assumed an authority almost absolute (*Ibid.*). That period occupied the whole duration of the Tudor dynasty, which this reign began, and it was thoroughly established in this reign. The acute historian thus describes the height to which the arbitrary power arose in this reign: The power of the kings of England had always been somewhat irregular or discretionary, but was scarcely ever so absolute during any former reign — at least after the establishment of the Great Charter — as during that of Henry. He came to the throne after long and bloody civil wars, which had destroyed all the great nobility, who alone could resist the encroachments of his authority; the people were tired with discord and intestine convulsions, and willing to submit to usurpation, and even to injuries, rather than plunge themselves anew into like miseries; and he ruled by a faction willing to support his power, though at the expense of justice and national privileges. These seem the chief causes which at this time bestowed on the crown so considerable an addition of prerogative, and rendered the *present reign* a kind of epoch in the *English constitution* (*Ibid.*, *Hume's Ad.*, c. xxvi.). And as this reign was the commencement of a dynasty which pursued the same system of rule with an iron consistency throughout the long period of its duration, upwards of a century, it is remarkable that the very title of the dynasty encouraged and almost assumed the assumption of arbitrary power. Our author was well aware of the importance of this era in our legal history, though he follows Bacon and Hume in dating it a little too late. "Before the times of Henry VII.," he says, "the nobility, supported by their wealth and power, were enabled to afford protection to persons who depended on them, even against the crown, and a precarious kind of liberty was diffused through the nation. But things from that time had taken such a turn, that the present nobility had become themselves the retainers of the court, where they contributed to increase the power of the crown, at the expense of everything. While they sat as judges in the Star Chamber, they would very readily gratify the inclinations of the prince by sentencing any obnoxious individual, and even one another, to the severest and most ruinous penalties. The courts of justice were also kept in awe of this supreme judicature, and no redress or relief could be expected from ordinary judges against the decrees of this tribunal, which would not scruple to punish such judicial interference as the highest contempt. No remedy could be expected but from the parliament, and the crown took care to keep that assembly as much in dread of the court and prerogative as the meanest individuals" (*Reeves*, c. xxxv.). It has been well said by Sir James Mackintosh that the reign of Henry VII. may be characterized as the return of the Lancastrian party to power (*Hist. Eng.*, vol. ii., c. iii.). The head of that dynasty, Henry IV., was the first sovereign since the Conquest who had acquired the throne really and virtually by force of arms. The right of conquest was recognized in that age; it had been declared by the late King Edward IV. (*Rym.*, xi. 710), and it was appealed to by Henry VII., in parliament (*Rot. Parl.*, vi. 268). He had, indeed, no other title to appeal to, for the nation, as all historians, from Lord Bacon downwards, have done, regarded the title of the house of Lancaster as invalid. Therefore it

tions of former establishments, are not less famous in the history of our jurisprudence: such is the statute of fines,

was that in reality he *relied* on the right of conquest as the surest basis of his title, and, indeed, he openly asserted it in the face of parliament, under the specious appellation of the "judgment of God." And although parliament did not in terms recognize it, and it was *omitted* in the recital of his title, it was *only* omitted; it was not protested against or negated. The question was rather avoided, and it was merely stated that the crown "should rest and remain" with him. But no other title than conquest was or could be referred to, and he well knew that he could rely on no other, as they well knew and found by experience that he meant to make it sure. And the very reason why they omitted all mention of it, while they durst not negative it, was that they knew it involved the dispossession of all their rights and destruction of all their liberties, if not of all their laws; at all events, involved this, that they were held forthwith at his will and pleasure. What apprehensions were entertained at the time as to the future character of the reign, and the frail tenures by which the people held their laws and liberties, was shown significantly by another incident in the legal history of the very first year. A great question was mooted by the chancellor before all the judges upon the act which declared that the crown should rest and remain with the king, according to the 7 Hen. IV., c. ii. (whose title was known to have rested on conquest); and the question was, whether the liberties and rights of the people would be thereby resumed — *i. e.*, by the right of conquest? And it was said that it would not be so: that is all (*Year-Book*, 1 Hen. VII., fol. 26). No reasons are given. The entry ends thus with significant suddenness and shortness, as if the question had been shuffled up rather than settled by any real judgment; because it was the doctrine of the age that a conqueror might dispossess all men even of their lands, since they had them of the prince who had conquered them. Lord Bacon describes the difficulty of the position in which the king stood at his accession: "That if he stood upon the title of the house of Lancaster, he knew it was a title condemned by parliament, and generally condemned; and as to claim as a conqueror was to put all in terror and fear, so that which gave him power of disannulling of laws, and disposing of men's fortunes and estates, and the like points of absolute power" (*Hist. Hen. VII.*, p. 3), and so he used the title of Lancaster as the means, and that of conquest as supporter" (*Ibid.*), though the former in effect resolved itself into the latter sense, as already observed. But under Henry VII. the power of parliament was prostrated, because the power of the aristocracy was subdued. The monarch was without restraint, his power was absolute, and his policy, even in enforcing the execution of the law, was to bend even the law to his will. It was not the era of the ascendancy of law, but of the ascendancy of the royal power, for the royal will was law. Lord Bacon, his eulogist, tells us that "his policy was to govern the people by means of the law, and the law by means of the lawyers" (*Hist. Hen. VII.*); and this was the policy of the dynasty. So Hume says, "that while he depressed the nobility, he exalted the lawyers, and by that means both bestowed authority on the law, and was enabled, whenever he pleased, to pervert them to his own advantage" (*Hist. Eng.*, c. xxv.). But though this was the object with which the king directed his policy, it was a necessary and salutary policy to enforce the execution of the law, and in that respect his policy deserves a careful study; because it will be found that everywhere, in every age, all government must be based upon a firm and effective execution of the laws, and that this can only be attained by measures and means which in substance, and in their general nature, bear a resemblance to those employed by Henry, and which will be found to have

and that for new-modelling the Star Chamber. Many other points of great importance attracted the notice of

been in substance perpetuated and retained, though limited and restrained, by constitutional and legal restraints, down to the present time. Those means and measures will be found to resolve themselves into these—the repression of the use of force and violence, even to enforce right, without the sanction of law, the enforcing prompt, effective, and local execution of criminal and penal laws, especially against offences of force and violence. “That,” says Lord Bacon, “which was chiefly aimed at was force, and the two great supports of force, combinations of multitudes and maintenance of headships of great families” (*Hist. Hen. VII.*, p. 38). In the pursuit of this object it is very observable that the king, feeling deeply the futility of merely enacting that the laws should be enforced, without providing a power to compel their enforcement, began by raising the formidable power of the Star Chamber, and then proceeded to call upon the local magistracy, under terror of that power, to enforce the laws. The order of these statutable enactments has not been observed by the author, who here, as throughout his history, neglects the historic method, and so loses some of the best results of legal history. In the light it affords as to the policy and mutual relation and illustration of various measures, the first measure was the Star Chamber act, because upon it the crown relied to enforce the carrying out all the others. “Early in the reign,” says Hume, “the authority of the Star Chamber, which was before founded in common law and ancient practice, was in some cases confirmed by act of parliament.” Here the historian adds in a note, “The preamble is remarkable, and shows the state of the nation at the time. ‘The king, our sovereign lord, remembering how, by unlawful maintenances, giving of liveries, signs, and tokens, retainers by indentures, promises, oaths, writings, and other embraceries of his subjects, untrue demeaning of sheriffs, in making panels, and untrue returns, by making money by juries, etc., the policy of this nation is most subdued’” (3 *Hen. VII.*, p. 17). “It must, indeed, be confessed,” continues the historian, “that such a state of the country required great discretionary power in the sovereign; nor will the same maxims of government suit such a rude people that may be proper in a more advanced state of society. The establishment of the Star Chamber, or the enlargement of its power in the reign of Henry VIII., might have been as wise as the abolition of it in the reign of Charles I.” Lord Bacon extols the utility of the court, but men began, even during the age of that historian, to feel that so arbitrary a jurisdiction was incompatible with liberty; and in proportion as the spirit of independence rose higher in the nation, the aversion to it increased, till it was entirely abolished by act of parliament in the reign of Charles I., a little before the civil wars (*Hume, Hist.*, vol. iii., c. xxvi., p. 60). This is an illustration of the philosophy of legal history—that is, the consideration of the laws of any age with reference to the spirit and character of that particular age. And no doubt the primary object of the constitution of the Star Chamber as a court of ordinary and arbitrary jurisdiction might be excused by the character of the age. Sir J. Mackintosh observes, “The statute-book attests the universal distemper of the community during the civil wars, and bears frequent marks of the vigorous arm of a severe reformer, employed in extirpating the evils of a long license. Of these not the least remarkable is the act for the authority of the Star Chamber, of which the first object seems to have been the suppression of the unlawful combinations which endanger the public quiet, or disturb the ordinary dispensation of the law.” Having thus provided a power in the state to coerce the local magistrates to carry the law into execution, and to deter local magistrates from presuming to obstruct

parliament, or were agitated in the courts, which make the reign of this king a period well worthy the attention of the historical student.

them, the king proceeded to call upon the local magistrates to enforce the law. And here again the order of the measures is most important to be observed, and to point it out is one great object of this note. "The king also," says Lord Bacon, "made a statute, monitory and minatory, towards justices of the peace, that they should duly execute their office, inviting complaints against them, first to their fellow-justices, then to the justices of assize, and lastly, to the king and chancellor (*i. e.*, in the Star Chamber), meaning thereby to have his laws executed" (*Hist. Hen. VII.*) The laws could not be executed effectually except by an effective local execution, and hence the measures designed to enable and enforce the summary execution of the laws by justices of the peace by means of summary convictions upon informations, the commencement of which important jurisdiction is to be found in this reign, and is one of its most remarkable characteristics (4 *Hen. VII.*, c. xii.). The following is the preamble, "The king, our sovereign lord, considereth how daily within this realm his coin is traitorously counterfeited, murders, robberies, felonies been grievously committed, and also unlawful retainers, idleness, unlawful plays, extortions, misdemeanings of sheriffs, escheators, and many other enormities and unlawful demeanings, daily grow more and more within the realm, to the hurt of his subjects and the subversion of the policy and good governance of this his realm, for the repressing and avoiding of which mischief sufficient laws and ordinances have been made, and lacketh nothing but that the said laws be now put in execution, which laws ought to be put in due execution by the justices of the peace, to whom his grace hath given full authority to do so, . . . he chargeth and commandeth all justices to endeavor to execute the tenor of their commission, and the laws and ordinances ordained for the subduing of these evils; and he chargeth and commandeth all manner of men, as well the poor as the rich (which be to him all one in due ministration of justice), that is hurt and grieved in anything that the justices may hear and execute, that he make his complaint to the justice nearest to him, or any of his fellows; and if he hath no remedy, then to the justices of the peace; and if he then have no remedy, then to the king or his chancellor" (4 *Hen. VII.*, c. xii.). This latter phrase means, no doubt, the Star Chamber. The local magistracy were thus strengthened and stimulated to put the laws in execution, more especially those directed against that which was the main mischief of those times, offences of force and violence, and combinations or retainers of men for purposes of force and violence. The principal of these laws were, first, the statutes against liveries and retainers, and next, the statutes of forcible entry. These statutes passed in the reigns of Henry VI. and Richard II.; and when the historian says, "There scarcely passed any session during this reign without some statute against engaging retainers, and giving them badges or liveries, a practice by which they were in a manner enlisted under some great lord, and were kept in readiness to assist him in all wars, insurrections, riots, and violences, and even in bearing evidence for him in courts of justice," he was not aware apparently that they only were in pursuance of older statutes passed in earlier reigns. This disorder, which had prevailed during many reigns, when the law could give little protection to the subject, was then deeply rooted in England, and it required all the vigilance and rigor of Henry to extirpate it (*Hist. Eng.*, vol. iii., c. xxvi.). But the great object was to enforce these laws, and put down all power of resistance to the royal authority. And this object was steadily pursued throughout the

In reviewing the legal transactions of this reign, we shall begin with the statutes, as usual, first noticing those

reign. Throughout the reign prosecutions upon this statute appear to have been pursued, and there are many such cases to be found in the reports of the reign. Thus, in the fifth year, there was an information for that the defendant gave a piece of cloth to a man to make himself a livery, and that he received it and used it (*Year-Book*, 5 *Hen. VII.*, fol. 17). Next year there was an indictment for *giving* of liveries, which, it was alleged, were received, but it was not alleged that they were worn or used, and this was objected; but it was answered, that when a man gave liveries he should have a great company at his disposal, so that men would fear to execute the law upon him; and that, if a man took his livery, though he did not use it, still he would be his man, and so within the mischief of the statute (*Year-Book*, 6 *Hen. VII.*, fol. 13.) In this reign the statutes were rigorously enforced, and all offences against the peace were repressed with vigilance and vigor. And the reports of cases in this reign were often extremely illustrative of the turbulence of the age, and the necessity for very stringent administration of justice, in order to uphold the authority of the law. In a writ of conspiracy the defendants pleaded that one Margaret was seized by a great number of men—to wit, about one hundred men—and was feloniously carried away. And the defendants followed them with forty persons on horseback, armed and arrayed *modo guerrino arraiti*, and pursued them to Derby, where they were indicted, etc. (21 *Hen. VII.*, *Keilway*, fol. 81). Here we find a band of one hundred men seizing and carrying away a woman, and then another band of forty horsemen, armed and arrayed like soldiers, pursuing them to a great distance, into a different county, and there overtaking them and seizing them. This gives a striking illustration of the character of the age, and it is a picture of the condition of any country before the reign of law is fully established. In the second year of the reign (as we find in the *Year-Book*), all the judges were assembled at the White Friars, at the desire of the chancellor, treasurer, and others of the king's council, to have their advice upon this case. Sir R. Crofts, treasurer of the household, and Sir R. Corbet, were each bound to the king *se bene gerendo*, and now they came with swords, daggers, and bucklers, and other defensive weapons, openly in the hall of Westminster and other places; and the question was, whether they had forfeited their surety or not? which they thought doubtful. But they all agreed that there was a distinction between this suretyship and the common suretyship of the peace, which was not broken without an affray or battery, etc.; but this suretyship might be forfeited by a number of men, and by their arms, etc., although they have not broken the peace. And this suretyship, they thought, would turn upon this, whether the party did anything which should tend to cause a breach of the peace, or to put people in dread or trouble—if he did, he should forfeit his surety (2 *Hen. VII.*, fol. 2). It was held in the reign of Henry VII. that every one might assemble his friends and neighbors to defend his house against violence, but he cannot assemble them to go with him to the market or elsewhere for his safeguard against violence (*Year-Book*, 21 *Hen. VII.*, fol. 39). Nothing more tended to promote the maintenance of peace and order and the proper execution of the laws than the enforcement of these statutes against force and combination; and the historian thus describes the result in securing the ultimate ascendancy of law: "The diminution of retainers, no doubt, was favorable to the prerogative of the sovereign, and by disabling the great noblemen from resistance promoted the execution of the laws, and extended the authority of the courts of justice" (*Ibid.*). This was the most important and most permanent characteristic of the age; in that respect our condition has never altered or retrograded, though during the

which relate to the king and the rights of persons, and then proceeding to those that affected the law of private

whole of this dynasty the ascendancy of the royal authority, in the absence of constitutional restraint, rose to the height of arbitrary power, and in that respect the constitution has happily been altered. "The nobles retained only that moderate influence which can never be dangerous to civil government. The prince, who in effect was the same with the law, was implicitly obeyed: and though the further progress of the same causes begat a new plan of liberty, founded on the privileges of the commons, yet, in the interval between the fall of the nobles and the rise of this order, the sovereign took advantage of the present situation, and assumed an *authority almost absolute*" (*Ibid.*). But there were another set of statutes directed against the use of force and violence, even in the maintenance of right, without the sanction of law, from which no evil results followed, and which, according to Lord Hale, produced an alteration of legal remedies for the recovery of real property, which our author has erroneously ascribed to another cause. These statutes were the statutes of forcible entry, passed in the reigns of Richard II. and Henry VI., and already under their reigns alluded to. But though passed in former reigns, they had not been always adequately enforced as they were in this reign, and they afforded, when enforced so summarily, a means of restitution to property taken by force, that, so long as claims to real property continued to be asserted by force, as more or less they did during this reign and the next, the remedy thus given, as Lord Hale states, superseded in many cases the old dilatory remedies by real actions. All through this reign and the next, actions of forcible entry were in frequent use as a common remedy for the recovery of real property, and it was this action, and not, as our author supposes, the action of ejectment, which in these reigns was substituted for the old real actions. It was not until the reign of Elizabeth that the action of ejectment came into common use, for reasons which will be there explained. Now, so far as regards the general principles of these measures of law or legislation, they are in substance such as must in any age be adopted in order to secure the maintenance of peace and order, and accordingly in substance they are retained in our own age. We have still a speedy execution of the law by summary convictions before the local magistracy, enforced on the one hand, or restrained on the other, by the great supreme jurisdiction of the court of Queen's Bench, which exercises all the salutary and legal powers of the Star Chamber; and we have still these laws against the use of force otherwise than by the sanction of law, and the statutes of forcible entry being at this hour in full operation. And there is yet another important part of the system of law and government established in this reign which still continues to exist, though in a more legal and constitutional form, or under limits more defined by constitutional law, and that is, the guarantee of law and order by the recourse to military force in their defence when the civil power is unequal to the repression of riot, insurrection, or rebellion. In the reign of Henry VII., indeed all through the duration of his dynasty, this recourse to military force for the prosecution of peace or the repression of disorder, was a regular part of civil government, whereas by the common law it can only be legally resorted to when absolutely necessary, or when, in time of war, or of rebellion amounting to war, it superseded, under the name of martial law, the ordinary law of the country. But Henry, the first sovereign of this dynasty, did not confine it within these limits. The king made rebellion subservient to his policy, by making it the pretext for the exercise of arbitrary power, and thus, after the complete suppression of an insurrection, the historian says: "And therefore, awakened by so fresh and unexpected dangers, he entered into due considera-

rights. After the landing of Perkin Warbeck in Kent, a law was made of a new impression. Apprehensive of

tion, as well how to weed up the partakers of the former rebellion as to kill the seeds of the like in time to come, and withal to take away all shelters and harbors for discontented persons, where they might hatch and foster rebellion, which afterwards might gather strength and motion. And first, he did make a progress to the north, though, indeed, it was rather an itinerary current of justice than a progress. For all along as he went, with much severity and strict inquisition, partly by martial law and partly by commission, were punished the aiders and abettors of the late rebels, not all by death (for the field had drawn much blood), but by fines and ransoms, which spared much life and made much treasure" (*Ibid.*, p. 23). The sovereign foresaw that arbitrary system of rule which he established might often occasion insurrections, and that martial law would afford himself and his successors a weapon of tremendous force for its repression by means of the terror of military executions; and in point of fact his successors, pursuing the same arbitrary system of rule, constantly resorted to that weapon, martial law, with terrible rigor. The king and his ministers, well aware that such an exercise of martial law would be illegal or questionable, and designing, according to that prudent policy by which, as Lord Bacon says, he sought to support prerogative by statute, projected a statute which should render the exercise of martial law in future safe by providing a sort of statutable indemnity. And he had an act passed (11 *Hen. VII.*) which declared that no one serving the king for the time being in the repression of rebellion should be legally liable for acts done in such service. It has been supposed that the scope of it was merely to protect those who served a *de facto* sovereign, and there has been much ingenious speculation as to the motives which should induce Henry VII. to pass a measure for the protection of the partisans of Richard III. But the terms of the statute not only do not restrain this interpretation, but rather negative it; and indeed the mere date goes far to do so, for it was an act of the eleventh year of the reign, when, on the one hand, the partisans of the previous monarch could not have had anything to fear for the support they had given him during his brief reign, and, on the other hand, the king who had succeeded him was far too firmly seated on the throne to fear that he would be dispossessed and that his supporters would ever be in any peril of prosecution for treason. But then his reign was disturbed by insurrections, which were always suppressed, and with great severity, by the exercise of martial law, as Lord Bacon describes in his history of the reign, and as Hume also mentions in his history. Now the persons who so executed martial law after rebellion was suppressed might be in peril of prosecutions, and there would be legal liability for such casual excesses as are certain to be committed on such occasions. And it might have been suggested to them that, especially under a king so eager for confiscations, they might be in peril of such prosecutions, and that it would be as well to have a legislative indemnity. And again, the king might have been willing to accede to such a measure, lest on occasion of any insurrection he should lose the benefit of their zealous and fearless service; while at the same time, to mark the real object of the measure, his lawyers would carefully insert some words which might mislead the parliament by appearing to apply it to the protection of persons serving a *de facto* sovereign. But it cannot fail to be observed, upon careful consideration, that it asserts a general principle of greater importance than the right of a *de facto* sovereign to allegiance. And it is singular that this, the only original statute of the reign, should have escaped the observation of most authors. It assisted and declared the right of the sovereign to require, and the right of the subject to render, in time of

the consequence of such attacks upon his title, Henry's friends prevailed on him to consent to some security for

rebellion or invasion, such military service as would be required and rendered in time of war; and further, it declared that for acts done in repression of rebellion the subject would not be harassed by criminal prosecution. It was, in fact, a general act of authority or indemnity for the exercise of martial law in time of rebellion, as in time of war at the command of the king. And it is probably alluded to by that great writer in a passage in his history of the reign, where he says that "martial discipline, a thing of absolute power, he would nevertheless bring to parliament" (p. 1133). And again, "that the king thought it safest to assert martial law by leave of parliament" (p. 1123). The statute recited and declared that the subjects of England are bound by the duty of their allegiance to serve their sovereign in defence of him and his realm *against every rebellion* which may be raised against him, and enacted that no person attending the king in his wars shall, for such service, be convicted of any offence. Mr. Justice Foster, in his "*Crown Laws*," cites this as *declaratory of the common law*, so that this is a clear declaration, on the authority of parliament and of this great lawyer, that the crown may, to repress rebellion, levy war upon rebels, and that for homicides committed in such suppression, they shall not be amenable to criminal law (*C. L.*, 390). In another passage, however, the same great lawyer, while giving the statute that broad and important application limits it by the constitutional principle of necessity. But in this reign and the ensuing reign there was no such limitation; and in that reign and under Edward VI. there was the same recourse to martial law upon the least appearance of insurrection, and though it had no great resemblance to war, and even after its complete suppression. In a great degree this was caused by the religious revolution which took place in the next reign, and the measures of confiscation and alteration in religion which it produced; and hence in the reign of Edward VI. the first riot act to authorize the use of military force, even on any occasion of riot, an act established after the revolution, and which, as Mr. Hallam observes, added immensely to the power of the executive government. It is obvious that all this was in complete pursuance of the policy of the present reign. These measures are illustrations of the manner in which important changes in law arose naturally out of the circumstances of the times. The truth is, that in this age, as in others, legislation (so far as it was wise and salutary, and not such as was merely dictated by selfish policy) was simply the result of practical experience and common acknowledgment of utility and public advantage. And this was remarkably illustrated in the legal history of this period with reference to that most important head of law and legislation — the law as to the title or transfer of land. In this, as in other instances, it may be seen how apparently remote are often the real moving causes of great alterations in the law. It might not at first sight be supposed possible that the wars of the Roses could have had any bearing upon the law of the practice of conveyancing, and the liberty of alienating land by will, and the decline of the feudal system, and the rise and growth of equitable jurisdiction; and yet it is beyond a doubt that those wars had such results, and in ways which it is easy to understand when explained. During those years, as each party gained the ascendancy, there were attainders for treasons, with forfeitures of lands and tenements, and in order to avoid these forfeitures, lands were changed by men to "uses," that is, interest for them and their heirs; these trusts being of course matters of conscience only cognizable in a court of equity. The advantage of this system was soon appreciated, and the constant changes in the position of the rival parties and the consequent uncertainty as to which of them might

them, in case of changes: this was done by stat. 2 Hen. VII., c. i., which ordains that no person who, in arms or

next be the objects of attainder, led both parties to favor the system from which both derived protection, and thus the court of chancery was allowed to enforce and execute these trusts or uses, and the two systems of conveyancing and uses grew up together. In this reign a case occurred, in which a knight had forfeited his land for treason in the reign of Henry VI., and when his party came again into favor he was restored (*Keilway*, 159), only in the meantime the king had seized, and both parties had an interest in preventing these forfeitures and preserving their lands to their families. The rise and growth of the practice of conveyancing land to uses was thus described by Lord Holt:—"In those times uses only affected the consciences of the feoffees to the uses, then the clergy, having power over the consciences of men, and sitting in chancery until the time of Henry VIII., compelled men to perform their agreements. These were kept secret until they were discovered in the contentions between the houses of Lancaster and York, at which time they were found very beneficial to save men's estates from escheats, and were tolerated by both parties for the common convenience, so that the greatest part of the estates of England were conveyed to uses. And in the reports of the time of Edward IV. there are more of them mentioned than at any time before, and so became the common conveyance." (*Holt, C. J., Jones v. Morley*, 1 *Lord Raymond's Rep.*, 291). This is perfectly true, and it was said again and again in the courts in the present reign that the greater part of the land of the country was held upon uses, and these conveyances to uses were especially resorted to in order to avoid forfeitures or feudal burdens. And as under the protection of the court of chancery this system of conveyance of land to uses had become established, it was greatly resorted to for this purpose. In the previous reign an excellent act had been passed, providing that all conveyances by *cestui que use* should be good as against the grantor and his heirs (1 *Rich. III.*, c. ii.), and this was enlarged by judicial construction so as to give the *cestui que use* the virtual power of disposition (21 *Hen. VII.*, fol. 21). There was a statute passed in the present reign, that the king should have his wardship and relief in the case of his tenant conveying land to uses (4 *Hen. VII.*, c. xvii.), but this only applied to wardship and relief and not to "primer seisin" or "livery" (26 *Hen. VIII.*, fol. 2), and only as to tenants *in capite* or chivalry (38 *Hen. VIII.*, *Bro. Abr., Liverie*, fol. 60). These statutes, it is obvious, recognized the system of conveyance of land to uses, and they were under the protection of the rising jurisdiction of equity. It is manifest that by means of conveyance to uses men might virtually dispose of their lands by last will, and that thus some of the burdens of feudal tenure could be evaded. And this was recognized by statute very early in this reign. For by the statute 4 Henry VII., c. xvii. (not mentioned by our author), it was provided, that if a man made conveyance of land which he held in chivalry to his use, and then died, and *no will was declared*, the lord should have the issue or ward, as if the tenant had died seized; and it was recognized in the cases which arose on the statute, that if a last will was declared in such a case, the king would lose his wardship (10 *Hen. VII.*, fol. 10). And numerous cases in the law reports of the reign show that men virtually, by means of conveyances to uses, devised their lands by last wills, under the protection of the court of chancery (*Keilway*, 42-45; 8 *Hen. VII.*, fol. 12; 21 *Hen. VII.*, fol. 19). And the statute, as will be observed, only saved the lord wardship, and not "primer seisin" or "livery." Numerous were the instances of last wills of land enforced as uses. And the tendency of this to unloose the fetters of the feudal system may be easily conceived.

otherwise, assists the king for the time being, should afterwards be convicted or attainted thereof, as of an

When a tenant *in capite* died, leaving the heir under age, the king could, under that system, seize the land and the person of the heir, and claim wardship, marriage, etc. This system of conveyance of land to uses might, it is manifest, be used not only adversely or evasively, but voluntarily and with mutual consent, to emancipate the land from the fetters of feudal tenure; and there is reason to believe that this process of emancipation went on during this reign to a great extent. The incidents of feudal tenure were uncertain; and the advantage of a more regular and certain tenure became more and more appreciated. This preference of certain for uncertain tenure would, moreover, be all the greater in an age when, by the establishment of internal peace, the inconveniences of military tenure became more and more felt. Hence a constant tendency to substitute the certain for the uncertain, and money payments as the equivalent for uncertain services. This tendency undoubtedly displayed itself with reference to villenage, the services of which were uncertain, in that respect resembling those of military tenure. There is a passage in Hume's history, in which he describes the process of change which was going on at this period. "The ancient tenures," he wrote, "composed that retinue of freemen, whose military spirit rendered the chieftain formidable to his neighbor, and were ready to attend him in every warlike enterprise. The villeins were entirely occupied in the cultivation of their master's land, and paid their rents either in corn and cattle and other produce, or in servile offices which they rendered on the farms. In proportion as agriculture improved and money increased, it was found that their services, though extremely burdensome to the villein, were of little advantage to the master, and that the produce of a large estate could be more conveniently disposed of by the peasants, the men who raised it, than by the landlord or his bailiff" (*Hist. Eng.*, vol. iii., c. xvii.). It should be observed that, as was held in this reign, the grant by the lord to the villein of any free estate, even for terms of years, operated to enfranchise him (11 *Hen. VII.*, fol. 13). There is every reason to believe that this process of enfranchisement, from mutual convenience, went on extensively in this reign; and it will be remembered, that it had been held in the reign of Edward IV. that copyholders were free tenants, who could assert a legal title (*vide Litt.*, s. 73). There is reason to believe that, on the same principle of mutual advantage, the system of conveyances to uses was largely resorted to in order to alter the nature of the tenure on which land was held, and convert it into socage-tenure, that is tenure on *certain* sources of rent; and it is to be observed, that frequent mention is made in this reign, and still more in the next, of tenure *in capite* in socage. But it was in the next reign, by reason of the suppression of the monasteries, that this system went on more extensively. All this, however, was lost sight of by our author, who does not mention some of the most important of these matters. It will be observed that the author in this chapter has treated separately, and at different places, of the subject of fines and uses, and has omitted to notice the statute of 4 Henry VII., c. xvii., providing that in cases of conveyances to uses by the tenants of the king, where no will was declared, he should have wardship and reliefs, as though the tenant died seized, a statute of which the very terms suggest the close connection subsisting between the subjects of fines, of uses, and of wills, as modes of evading the incidents of feudal tenure, especially as it was accompanied by the Act of the same year (4 *Hen. VI.*, c. xxiv.) as to fines, and had already been preceded by a statute (1 *Hen. VII.*, c. i.) as to pernors of profits; that is, those who had the profits of land to their use. These subjects being treated separately, their natural

offence, by course of law, or by act of parliament; and all process and acts of parliament to the contrary are de-

and intimate connection is lost sight of; and it has been therefore deemed necessary, in these introductory observations, to exhibit that connection, and the important results of their joint operations. Closely connected with the subject of conveyances to uses is that of the usual mode of conveyance, which was by means of fines. The two principal measures of the reign, so far as regarded private law, were those as to uses and as to fines, neither of them *original*, but founded on previous law or legislation; and for want of acquaintance with the legal history there has been much misunderstanding among our historians as to the nature and effect of these measures, especially that as to fines, the real causes and character of which it is impossible to understand without a reference to the general history of the previous age. Hume says, "The most important law in its consequences which was enacted during the reign of Henry, was that by which the nobility and gentry *acquired* a power of breaking their ancient entails, and of alienating their estates" (*Hist. Eng.*, c. xxvi.). The historian, it is true, adds in a note: "The practice of breaking entails by means of a fine and recovery was introduced in the reign of Edward IV.; but it was not, properly speaking, law until the statute of Henry VII. (4 *Hen. VII.*, c. xxiv.), which, by correcting some abuses that attended the practice, gave indirectly a sanction to it." And then he goes on in the text: "By means of this law the great fortunes of the barons were gradually dissipated, and the property of the crown was increased." And he observes, "that probably the law foresaw and intended this consequence." It has been shown in a subsequent volume, that under the statute *De Donis*, in the reign of Edward I., fines, when used for the purpose of barring estates-tail, were declared void, and recoveries were afterwards used for the purpose: and that the notion that they were introduced for that purpose in the reign of Edward IV. is an entire error, as they had been used ages before. Fines, however, continued to be used for the purpose of conveyancing; and in later times, as already has been seen, for the purpose of conveyances to uses. And it has been observed, in a previous volume, how valuable they were, in a turbulent age, as authentic records of titles preserved among the muniments of courts of law. In that way, in such an age, they were far more valuable, probably, than in barring entails of estates: for in an age when, by reason of constant strife, so few succeeded in the direct lineal descent, the great object must have been to preserve the estates in the *families*, and protect them from forfeitures; and hence the importance, in that age of fines, and especially of fines when made the means of conveyances to uses; for they were thus records of titles, and of titles which, by means of uses, were protected from the great perils of the times. In such an age, the importance of the *finality* of fines, or of their validity as a protection against *litigation*, was of far less consequence than their value as records and safeguards against violence; and hence the statute of Edward III. altered the law, by allowing claimants to dispute a fine, even after years of non-claim. In those days the perils from litigation were much less than the injury arising from barring men of their claims, who, in such times, were very often unable to attend to them. But when the character of the age altered, and the times became more peaceable, the importance of the finality of these recorded titles as a protection against revival of old claims would appear more and more serious; and hence the statute of this reign as to fines. One of the great causes of the making of that statute was the constant turbulence of the times, which hindered men from making their claims in due time. The law of non-claim being ousted, in process of time, a defect was found in the validity of fines, and they became nothing more than feoff-

clared void. This act is said by a learned and eminent writer,¹ to be rather just than legal, and more magnani-

ments of record, by reason of which the security of men's inheritances, it was said, was taken away, and thus was the occasion of the making of this statute. The preamble was, that the king considering that fines ought to be of the greatest strength, to avoid strife and debate, and to be a final end and conclusion, and of such effect they were taken before a statute of non-claim, and now it is used to the contrary, to the universal trouble of the king's subjects, willeth, therefore, that it be enacted, etc. And then it was enacted that fines should bar strangers as well as heirs after five years' non-claim. The statute of fines in this reign did only restore the ancient law. The statute was, except as to parties under age, to bar all rights then existing; and this, of course, had a great effect in settling titles and preventing litigation. But it is obvious that it grew naturally out of the alteration of the circumstances of the times, and was a restitution of ancient law. Thus Lord Bacon wrote of it: "The king made a law suitable to his own act and times; for he himself had, in his person and marriage, made a final concord in the great suit and title for the crown; so by this law he settled the like peace and quiet in the private possessions of his subjects, ordaining that fines thenceforth should be final, to conclude all strangers' rights, and that upon fines levied and solemnly proclaimed the subject should have his time of entry for five years after his title accrued, which if he forepassed, his right should be bound forever after. This statute did in effect but restore an ancient statute of the realm, which was itself also made but in affirmance of the common law. The alteration had been by a statute commonly called the statute of non-claim, made in the time of Edward III. And surely this law was a kind of prognostic of the good peace which since his time hath for the most part continued in this kingdom until this day; for statutes of non-claim are fit for times of war, when men's heads are troubled that they cannot intend (*i. e.*, attend to) their estates. These statutes that quiet possessions are fittest for times of peace, to extinguish suits and contentions, which are one of the banes of peace." (*Hist. Hen. VII.*, p. 43.) The philosophic mind of Bacon, it will be seen, recognized the growth of laws out of the natural necessities of the times, and gave truer explanation of their origin than any theories of far-seeing policy. And, accordingly, this statute was the precursor of the first statute of limitations, which in the next reign was passed upon the same principles of policy. Meanwhile the system of conveyances by means of fines, which had hitherto been adopted mainly for the sake of security, was now resorted to for the purpose of formality, and especially for the purpose of conveyance of land to uses. The connection between these two subjects was rather lost sight of by our author, who has treated them separately, whereas they were in practice closely united; and, as already observed, the system of conveyances to uses was intimately associated with that system — jurisdiction of equity — by which they were protected and enforced. It has already been seen that uses were protected in equity, and that therefore the grant of uses promoted the use of equitable jurisdiction. And one great characteristic of the age, upon the legal history of which we are about to enter, is the use and rapid growth of equity. This, indeed, had commenced towards the end of the previous reign of Edward IV.; but it was advanced and developed in the present reign, and began to have a great effect in superseding the inconvenient and often oppressive incidents of the old feudal system of law. This may be illustrated by a remarkable case which occurred in the 7th of Henry VII. One Read (proba-

¹ Lord Bacon.

mous than provident. It seems, however, to have been founded on principles of humanity and good sense.

bly the alderman who was so cruelly oppressed at a subsequent period) had land extended to him upon a statute-merchant; upon which one Capel, by means of a "recovery," got hold of the land, and thus deprived Read of his security. Read had no remedy at law, for he could not, as a mere tenant under an execution, "falsify a recovery," as it was called; and it was not until the next reign that a statute passed to enable parties with less estates than freehold to get rid of recoveries as collusive and fraudulent. He therefore went before the chancellor and had relief in equity, as he had no remedy at law (*Year-Book*, 7 *Hen. VII.*, fol. 11). And it was said he should be restored by the court of chancery upon conscience, for he had no remedy at common law (*Ibid.*). The effect of such a decision in breaking the fetters enforced by the old feudal law must be obvious, and principles were laid down of far wider application than the particular case, for it was said by the chancellor, that when a feoffment was made in confidence — *i. e.*, to a use — though the feoffor had no remedy at common law — *i. e.*, to enforce the use or trust — he should have a remedy in chancery (*Ibid.*). Uses had long been resorted to in order to evade the oppressive incidents of the feudal system, and it was not until the next reign that a statute passed to turn uses into legal possession. Hence it will be observed how the jurisdiction of equity anticipated, so to speak, the wisdom of legislation, and had already worked changes which legislation afterwards confirmed. Another and still more remarkable instance of this has escaped the attention of our author and of all historians, and that was the use of wills or testaments of land, under the shelter of the law as to uses. There was a close connection between the two systems, for the "use" was a declaration of will, which might or might not be executed *inter vivos*, and a testament was only the declaration of a last will, to be executed after the testator's death. Hence, in a case at the close of the reign of Henry VI., it was laid down that feoffees to a use should be bound to take notice of the will of the *cestui que use*, and that suit in equity would lie to enforce it — *i. e.*, because it was the will of the donor (*Year-Book*, 37 *Hen. VI.*, fol. 35). Thus it will be seen that the most important changes in law and legislation in this reign arose naturally and almost unavoidably out of gradual changes in the circumstances of the times. So that legislative changes usually arose out of changes which had already taken place in the law. That which was the case as to secular law seems also eminently to have been so with regard to the church and its relations to the state, and especially as to its privileges, powers, and immunities with reference to civil or secular law. Many events in previous reigns had prepared the way for great changes in these matters, and secular incidents occurred in the course of the present reign. Thus with reference to the papal supremacy in ecclesiastical matters. The papal supremacy in spiritual matters was fully recognized in the courts of law, where, however, it was said that of things spiritual mixed with temporal, act of parliament could make the law (*Year-Book*, 21 *Hen. VII.*, fol. 7), implying that in things purely spiritual parliament could not do so, and that even in things spiritual mixed with temporal, it was only act of parliament which could take them out of the supreme appellate jurisdiction of Rome. And hence it appears from the *Year-Books* of this reign that commissions of delegacy were sent by the See of Rome into this country to hear appeals in ecclesiastical cases, even matters testamentary (*Year-Book*, 4 *Hen. VII.*, fol. 15). And it was there said, that papal excommunication was no disability by our law — *i. e.*, no temporal disability. The papal supremacy was confined to ecclesiastical matters, and not recognized in matters temporal. Several cases had occurred

To throw a splendor round the crown, Henry had resolved that all persons bearing any relation to the king

in the courts during the late reign, or in the earlier portion of the present, which showed significantly how strongly the current was tending against the See of Rome. Thus in the first year of Henry VII. a case occurred as to the effect of a papal excommunication for an act of spoliation. "The chancellor demanded of the justices what should be done as to the alum which was taken by the English of the Florentines in England, for that our holy father the pope had excommunicated all who had attached the said alum. And it was said by the justices that it was under the protection of the king;" in other words, that the papal excommunication did not matter. And Hussey, Chief-Justice, said, in the time of Edward I. the pope sent letters to the king, that he should keep the peace with Scotland; and the king, by the advice of his council, wrote, that he had not in the temporality any person above him, since he is immediate under God. And the Bishop of London said, that when the pope wrote letters to Henry VI. in derogation of the royalty, Humphrey, Duke of Gloucester, put them in the fire (*Year-Book*, 1 *Hen. VII.*, fol. 10). Here we have a decided repudiation of any right on the part of the pope to pronounce judgment even on the spiritual or moral character of acts of state. But it is abundantly obvious, on the one hand, that his spiritual supremacy was impliedly admitted; and, on the other hand, it appears that there was no attempt on the part of the papacy to insist upon anything beyond, however difficult it may have been, practically to exercise the spiritual supremacy without appearing evidently to intermeddle with the temporal. How little the laws of the church were regarded when they came in contact with the law of the realm was shown in a most striking way by a case which occurred at the close of this reign, and in which it was held that if a priest or a nun married, the issue should be deemed legitimate, which, of course, implied that the marriage was legally valid (21 *Hen. VII.*, fol. 40). At the assizes at Warwick, in a suit for the recovery of real property, it was found by verdict that the tenant's father had taken holy orders before his marriage, and that the plaintiff had therefore claimed the land as lawful heir; but when the matter came to be debated in the Exchequer Chamber before all the judges, it was held that the tenants are not to be deemed bastard. And the chief-justice said it had been so adjudged before; and that if a priest took a wife and had issue, his issue should inherit, for that the espousals were not void, but voidable. And if a man took a nun to wife, the marriage was not void (21 *Hen. VII.*, fol. 40). And so it was recognized as good law, what had been adjudged in the previous reign, that if a man, after issue born, was divorced, and married again, and had other issue, and then died, and the first issue sued in the spiritual court to recover the sentence of divorce and bastardize the issue of the second marriage, the king's court would grant prohibition, although marriage had always to be allowed to be a matter of spiritual cognizance, and the effect of granting prohibition would be of course to prevent an appeal to Rome (12 *Hen. VII.*, fol. 22). In other words, the king's courts claimed to restrain the exercise of the spiritual jurisdiction even in matters spiritual, where, by reason of the determinations of the spiritual courts being recognized in the courts of law, this would affect the temporal rights, and would do so in such a manner as to interfere with the determinations of the courts of law. It has been shown in the notes to previous reigns how gradually the principle of royal supremacy in spiritual matters mixed with temporal had been advanced by the devices of the crown lawyers and the decisions of the king's courts; and this was especially remarkable in respect to the power of the bishop to refuse a presentee for unfitness. No one could doubt that this was a purely spiritual

should be about him in his expeditions; and we find two statutes made for this purpose; the first was stat. 11 Henry VII., c. 18, which required all ^{Attending the king in his wars.} those who had any office, fee, or annuity, by grant from the crown (not having the king's license to excuse, or any

function, and it was admitted by the courts of law in the reign of Henry VII. that the bishop, in determining it, was the judge (15 *Hen. VII.*, fol. 8), as it was a purely spiritual matter. Nevertheless, by slow degrees, the king's courts virtually got the determination of the question a good deal into their own hands. It was first held that the cause of refusal ought to be certain, and set forth by the bishop distinctly, as that the presentee was illiterate, or a mere layman (11 *Hen. VII.*, fol. 37; *Dyer*, 254, 293). From this it was but a step that the king's court should claim to determine upon the sufficiency of the cause) and thus the development of the royal supremacy had come to the very verge of an assumption of the spiritual. In the last reign, it has been seen, the opinion was openly avowed in the courts of law, that the effect of the statutes of præmunire was that if a man sued in the court of Rome, even when he might sue in the ecclesiastical courts of this country, he incurred the tremendous penalty imposed by these statutes, that is, deprivation of property and perpetual imprisonment. And, of course, though this would not apply to an appeal to Rome on a matter allowed to be within the cognizance of the ecclesiastical court, it was evident that it would apply to a party prohibited from suing even in the ecclesiastical courts of this country. Thus the king's courts claimed virtually to prevent the exercise of the spiritual supremacy of Rome even in matters spiritual, wherever they considered that it would interfere with their temporal jurisdiction, and though they acknowledged the papal supremacy in spiritual matters, they claimed to draw the line which separated the spiritual from the temporal. It is manifest that the development of the royal authority, and the ascendancy of the law, and the power of the state, and the course of events which had led to such results, were preparing the way for great changes in the law with reference to the church. And the disposition on the part of the king's court to restrict the powers of the church to matters purely spiritual, and to prevent them from interfering with matters temporal, naturally led the courts of law to be extremely jealous of the privileges of the church when they took the form of immunity from the jurisdiction of the temporal courts in respect of offences against the temporal laws. Those privileges took that form in privilege of sanctuary and privilege of clergy; and in the first year of this reign, and throughout the reign, we find the privilege of sanctuary openly denounced in the courts as a privilege for crime and as discreditable to the church (1 *Hen. VII.*, fol. 23), and in several cases disregarded, and the authority of the pope on its behalf set at naught (*Year-Book*, 1 *Hen. VII.*, fol. 26). And in the same spirit, in the course of this reign, as our author above mentions, the first of a series of acts was passed to limit and restrain the privilege of clergy. It must be obvious that the ascendancy of the regal power, as representing the temporal law, was thoroughly established over the spiritual powers and privileges of the church, so far as they interfered with the temporal jurisdiction, and that the king's authority was already absolute over all classes of subjects, spiritual as well as lay, so far as regarded spiritual jurisdiction. It is manifest, also, that this was part of the result of that complete ascendancy of royalty over all other powers in the state which had followed from various causes to be found in the history of the age, and led to the establishment of that absolute power which forms the distinguishing characteristic of the dynasty.

infirmity to prevent them), to attend the king in person when he went to war; and if they failed, all such grants were to be void. This was not to extend to any spiritual person, the master of the rolls, nor officers or clerks in chancery, or the justices of either bench; nor to the barons of the exchequer, or other officers of their courts; the king's attorney or solicitor, or his serjeants-at-law. This point was pushed further a few years after by stat. 19 Henry VII., c. 1, and extended to those occupying honors, castles, lordships, manors, lands, tenements, or other possessions and hereditaments of the grant of the crown, who were thought to be bound by a stronger duty than those of the former description. By this act such persons are entitled to the king's wages from their setting out to their return. The exceptions, in this latter act, were extended to the clerk of the king's council, to persons above sixty and under twenty-one years, and to cases where the patents mentioned the grant to be for a sum of money.¹

Particular privileges had before this been granted by parliament to persons in the king's service. Persons in the king's wages beyond or upon the sea, were not to be prejudiced by any descent, and might make their attorney to enter lands descended, or to attorn. Those with the king in his wars might make feoffments to the use of their wills without license; they were to have their own liveries, and they had authority to dispose of the wardship of their lands.² While Henry was thus steady in exacting due attendance from the retainers of the crown, he was equally attentive to diminish the number of those of great lords. He was very strict in enforcing the statutes of liveries. The parliament added two more to the number of these regulations for lessening the influence and strength of the nobility in the country.³

These were all the parliamentary provisions that seem to concern more particularly the king's person, and do not come under any of the heads under which the other acts of this reign will be arranged. Before we come to those on private rights, we shall briefly notice certain laws that were

¹ These laws cannot but bring to our recollection some former passages in our history. *Vide* vol. ii., c. ix.

² Stat. 7 Hen. VII., c. 2, 3.

³ Stat. 3 Hen. VII., c. 12, and stat. 19 Hen. VII., c. 14.

made for better regulating the lower orders of the community, and one that respects bodies politic and corporate.

It is probable that the cessation of the late civil contests had left many unemployed persons to become vagrants and infest the country; for we find two statutes for the correction of this evil, which seem to treat it with much severity (*a*). Vagabonds, idle and suspected persons, were to be set in the stocks three days and three nights, without any sustenance but bread and water; after which they were to be put out of the town. It was enjoined, that no one should give anything else to such idle person, under the penalty of forfeiting a shilling. Poor persons not able to work were to resort to the hundred where they last dwelt, were best known, or were born, and there remain, under the penalty of being punished in the above-mentioned way. To suppress the nurseries of idleness and beggary, it was provided, that no artificer, laborer, or servant, should play at any unlawful games, except in Christmas. The common selling of ale might be checked by two justices of the peace.¹ Several laws were made for the adjustment of trade and commerce, the employment of persons in agriculture (*b*),

Vagrants.

(*a*) This was the first of a series of severe laws passed under this dynasty against vagrancy, which, there is reason to believe, had arisen out of the villenage — that is, out of the natural disposition of men to escape from that condition by leaving their lords, especially since, by an ancient law, if they lived in a town a year unclaimed, they were emancipated. That villenage still subsisted in this reign is shown by some of the cases in the Year-Books of the reign. In writ *de homine replegiando*, the defendant said that the plaintiff was his villein, and the other said he was free; and the plaintiff had to find surety to pursue the writ with effect; and he shall be taken to deliver his goods and his body to the defendant if the issue shall be found against him (5 Hen. VII., fol. 3). During this period, villenage was indeed becoming obsolete, but it was not abolished. In the reign of Richard III., one John Huston brought an action against the Bishop of Ely for claiming him to be his villein, and lying in wait to seize him; and the bishop justified, and alleged that the plaintiff was his villein regardant to a certain manor of his; and thereupon they were at issue; and pending the suit, the bishop was disabled by act of parliament, upon the accession of Henry VII.; and as the crown had seized the temporalities, and so was interested, it interposed to prevent a trial, and so the case was not decided. In the reign of Henry VII., Frowike, who was chief-justice, gave a reading upon villenage, which shows that it was not then obsolete. There are cases in the Year-Book of Henry VII. on the subject, which show, however, that villeins were acquiring property, and gradually becoming enfranchised by the acts of their lords.

(*b*) This was the era of enclosures of land, and one of these acts related to

¹ Stat. 11 Hen. VII., c. 2; stat. 19 Hen. VII., c. 12. *Vide* vol. iii.

the building of houses of husbandry, the regulating of the wages of artificers, the apprenticing of boys, and other objects of an economical kind; but these were mostly experimental, and led to improvements of a more general nature in the next and subsequent reigns.¹

That corporations might not carry the right they had to make by-laws too far, it was ordained, by stat. 19 Hen. VII., c. 7, that all acts and ordinances made by the wardens, masters, and fellowships of craft and mysteries, and by rulers of guilds and fraternities (a), shall be approved

it. Lord Bacon, in his history of the reign, mentions that enclosures of land had become frequent (he does not say how it was effected, and whether or not by private acts of parliament), and that the legislature, not liking to restrain enclosures (for "that were to prohibit improvement," p. 44), preferred to enact that farm laws should be maintained, so as to carry out the object of enclosures. It need not be stated that such legislative enactments upon laymen became obsolete. But enclosures have ever since gone on, only they have in modern times been under the authority of general or particular acts of parliament. It may be mentioned here, that in this reign the powers of the commissioners of sewers — first established in the reign of Henry VI., for the protection of the land from floods, or from the encroachments of the sea, were extended; but in this, as in most other such subjects, the main legislation began in the next reign. In another case in this reign, it was held that if the lord granted the villein a lease or tenancy for years (which might be, as Littleton had shown, a year or for half a year), the villein was enfranchised (*Year-Book*, 11 Hen. VII., fol. 13). And no doubt the better and more industrious of the villeins were enfranchised in some such way as that, or by residence in a town for a year practising some trade or art; but there is as little doubt that many others wandered away and lived a vagabond life. The issue of a villein, it is to be observed, generation after generation, were villeins. The lord might enfranchise a villein by express grant, but though he enfranchised the villein and "his issue," that did not enfranchise the villein's future children, but only those already born (15 Hen. VII., fol. 14). Until enfranchised, the villeins went with the estate like cattle, and all the fruits of their labor went to their lords. It may be well conceived that, on the one hand, such a pernicious and oppressive system tended to produce habits of listless idleness, and, on the other hand, to beget a strong desire to escape from its bondage, and hence, no doubt, thousands of villeins wandered away, and thus out of villenage arose vagabondage. The severe laws passed against it in this reign were continued in all subsequent reigns.

(a) There was one feature of the policy of this reign to which neither Hume nor our author has done justice, and that was the encouragement of corporations, those great nurseries of industry, freedom and civilization. Hume, indeed, observes, that the first incident which broke in upon the violence of the feudal system was the practice, began, he says, in Italy, and imitated in France, of creating communities and corporations, endowed with privileges, and a separate municipal government, which gave them protection against the tyranny of the barons, and which the prince himself deemed it prudent to respect (*Hist. Eng.*, v. iii., c. xxiii.). But he fails to notice the laws passed in this age for the extension of their power; and, indeed, always

¹ Stat. 11 Hen. VII., c. 22; stat. 4 Hen. VII., c. 29.

by the chancellor, treasurer, or chief-justices of either bench, or three of them; or by the justices of assize in

gives the impression that the laws of this reign were rather against them than in their favor. There was certainly an act of Henry VII., which contained a clause to restrain corporations from making ordinances in diminution of the royal prerogative (19 *Hen. VII.*, c. vii.), and that clause alone the historian mentions; whereas the act provided that by-laws might be made by corporations for good government, according to their charters or prescriptions, only they were to have the approval of the Lord Chancellor and Lord Chief-Justice, in order to protect the royal prerogative (19 *Hen. VII.*, c. vii.). And on the other hand, a series of laws passed, commencing with this reign, giving corporations or chief officers of corporations the most important powers as to trades, and various other matters (7 *Hen. VII.*, c. iv.). And by stat. 33 Henry VIII., c. xxvii., in acts done by corporations the consent of the greater part was made binding on the whole. Thus, under a statute of Elizabeth, they were to exercise powers of search or supervision over various important manufactures, as of cloth or leather (39 *Eliz.*, c. xx; 1 *James I.*, xxiii.), and to hear and determine matters relating to servants, etc. (5 *Eliz.*, c. iv.; 8 *Eliz.*, c. xxii.). These statutes mark the character of the era on which we are entering — that of the ascendancy of law and order, and of all power derived from the crown. An important judicial decision had taken place in the reign of Henry VI., which gave mercantile corporations, as well as municipal, a legal status in courts of law. That was in case of an action against the Society of Lombard Merchants; and it was held that the society could, and indeed ought, to appear by attorney, as the mayor and corporation of a city — *i. e.*, as a corporate body, and not a mere collection of individuals (*Year-Book*, 19 *Hen. VI.*, fol. 80). This decision, perhaps, marks the rise of those commercial corporations which have continued from that time to the present; for formerly the only corporations much known were either religious, or eleemosynary, or municipal. The movement thus commenced in favor of corporations was encouraged to the utmost by the courts as well as by the parliament in the course of the present reign. Thus it was said, that a "corporation could have plowmen and servants in husbandry, butlers and cooks *et hujusmodi* (without retainer by deed), and that a servant could justify by command of a body politic (4 *Hen. VII.*, c. xvii.); and many cases as to corporations occurred in this reign, recognizing their corporate character and capacity." These decisions indeed are observed to begin in the latter part of the reign of Edward IV., where there are several such cases. In one of these it was said, that a guild or fraternity required a special incorporation (20 *Edw. IV.*, fol. 2); but in another it was said that the king could incorporate any body of men, just as the ancient cities were incorporated either by charter or prescription (21 *Edw. IV.*, fol. 55); and there were cases in which the motive and character of corporations was elaborately discussed (21 *Edw. IV.*, fol. 12, 27, 67). And in the present reign, there was a case in which it was laid down that the king could grant an incorporation by the name of the "master and wardens," etc., and give them power to sue, and be sued by that name (11 *Hen. VII.*, fol. 27). How these corporations tended to encourage industry and protect liberty, will be manifest when it is borne in mind that ever since the Conquest the law had been that a villein residing unclaimed a whole year in a corporate city or borough was enfranchised, and it was said, in one of the cases already cited, that a villein might be mayor of a corporation (21 *Edw. IV.*, fol. 7). Thus, then, while villenage was dying out, corporations, municipal or mercantile, were extending, and the reign of law and order, though after a long period of royal tyranny, was to be the prelude to the reign of law and liberty.

their circuit; and that otherwise they should be void. It was further ordained, that no by-law should be made to restrain suits in the king's courts.

The statutes made in this reign upon the subject of private rights related entirely to the modes and circumstances of alienation, whether in real or personal property. Of this nature were the statute of fines, those relating to the pernors of profits, and an act to prevent the alienations of jointresses. The only act respecting personality which we shall have occasion to notice, is that for preventing gifts of goods in order to defraud creditors.

The most remarkable regulation in this reign on the subject of real property is the statute of fines, 4 Hen. VII., c. 24, copied chiefly from that in the last reign. This act has been considered in two views; either as intended to make a fine a bar to an entail, or to give to this ancient assurance the force and validity it possessed at common law, before the statute of non-claim (*a*).

(*a*) This act altered the statute of non-claim (34 *Edw. III.*, c. xvi., *vide ante*, c. xiii.), the effect of which, however, has been much misunderstood, and was only to oust parties of the bar which non-claim raised. At common law parties to a record, such as a fine or recovery in a real action, were bound, with their heirs or privies, after non-claim for a year and a day; and at common law, proclamations were made on a recovery by default and by the statute *De Finibus* (18 *Edw. I.*). Fines were to be openly read in court, in order to secure that publicity and notoriety which were of the essence and substance of both modes of proceeding, and good notice to persons interested to come forward and make their claims. If they did not do so, they were barred, and this was altered by the above statute of Edward III. But then it was only altered thus far, that parties were ousted of the bar which non-claim raised, and were put in the same position as they would have been at common-law *within* the year. But if parties or privies, they could not dispute the fine being stopped by it, which, however, was altered by the statute *De Donis* in the case of estates-tail. If, however, *not* parties or privies, they could within the year at common law, or at any time by the statute of non-claim, contest the fine. Still they could only do so according to the case by showing that the parties to the fine had no freehold estate in the land at the time the fine was levied. The law, again, was altered by the present statute, by repealing the statute of non-claim in so far as it made mere non-claim a bar to a claim. There had been a previous statute on the subject in the preceding reign of Richard III. By that act a fine was to be only read and proclaimed in court, and a transcript sent to the county where the bond was, *to be openly proclaimed there*, which being certified, all persons were to be barred. These open and public proclamations, which exempted the proclamations made before recovery by default in a real action, operated as public notice to all persons interested to come forward and make their claims. And this public notice constituted the essence and substance of the proceeding either by fine or recovery. For some reason this statute, it was thought, required amendment. Hence the present act. The only safe way of arriving at the real mischief or

Those who are of the former opinion argue in this way: Notwithstanding, say they, the blow that was given to the statute *De Donis* by the determi- Statute of fines.

meaning of a statute is to see what the law was deemed to be just before it passed. Now, just before the statute above treated of, it was held the form of pleading to avoid a fine was that the parties to a fine had not, nor either of them, at the time of the levying of the fine, anything in the tenements, but a certain party, etc., or to confess the fine and avoid it by title-paramount and re-entry (3 *Hen. VII.*, fol. 9). The fine, indeed, was conclusive between the parties to it, but as regards strangers, they could avoid the fine by showing that the parties had no estate in the land; but under the statute, after fine and proclamation, the issue of the consor were barred (*Bro. Ab.*, *Fines*, fol. 109). It was settled in the last reign (as has been seen) that on a fine *sur consouance de droit*, levied by the ancestor, the issue could not set up continuance of possession, notwithstanding the fine, although the person in remainder could, because the issue was privy in law to the fine, and bound by it; whereas the person in remainder was not (12 *Edw. IV.*, fol. 12, 15). It was doubted whether this was by the common law or by the statute 27 Edward I., the statute *De Finibus* (*Ibid.*). But it should seem that fines were at common law, since (apart from statutable power and remedies) they were only warrants acknowledged of record (18 *Edw. IV.*, fol. 22), and the general principle appears clear that record bound parties or privies in law, though not strangers, and that strangers could only defeat the fine by showing that the parties had not a freehold estate in the land. There is reason to believe that this was chiefly because the nature of the times was such as often to preclude men from making their claims; because it appeared to be recognized after the statute as to recovery by default that it was reasonable they should be final after public proclamation had been made (*Hen. IV.*, fol. 19; *Statham's Abri.*, *Proclamation*, 3). When looked at in this point of view, that is, as accompanied with public notice to all the world, the reasonableness of such a mode of final settlement of title would appear very clearly, and it approached to the modern system of a parliamentary settlement and registry of title, the essence of which is such public notice. And it was probably because, as to fines, they were not forced to afford such means of publicity, or because the nature of the times was such as often to deter claimants from coming forward, that the statute of Edward III. was passed ousting non-claim. It has been seen that the substance and essence of this system of transfer consisted in publicity and notoriety, as a means of notice to all parties interested. And hence the above statute carefully provided that *proclamations* should be made in four terms. And after these proclamations as notice to all parties interested, and after the five years elapsed which were allowed them to make their claims, all future claimants, strangers, or parties were levied. This was in pursuance of the common law, and of the policy which, in the next reign, led to the statute of limitations (32 *Hen. VIII.*), that is, the policy of settling titles and preventing litigation. The most important point to be observed is, that *publicity and notoriety* were of the essence of the system; and that upon publicity was based the finality of the settlement and the record of the title. This seems in accordance with Lord Bacon's view. "First, then, he made a law suitable to his own acts and times; for as he himself had in his person and marriage made a final concord on the great suit and title of the crown, so by this law he settled the like peace and quiet on the private possessions of his subjects, ordaining that *fines thenceforth should be final*, to conclude all strangers' rights; and that upon fines levied and solemnly pro-

nation in *Taltarum's* case, the effects of entails were viewed with a jealous eye by this king. It should seem something more was wished than this resolution to substantiate so bold and new a doctrine as that of barring entails, and virtually repealing an ancient statute, upon which the landed property of the kingdom had been settled for

claimed, the subject should have his time of watch for five years after his title accrued, which, if he forepassed, his right should be barred forever after, with some exceptions of women, married women, etc. And surely this law was a kind of prognosticate of the good peace which, since his time, hath for the most part continued in this kingdom until this day; for statutes that quiet possessions are fittest for times of peace, to extinguish suits and contentions." This is a true and just explanation of the matter, and affords an admirable illustration of the manner in which changes of law have grown gradually and naturally out of changes in the character of the times. It has already been stated that Hume, when he stated that by the above statute men *acquired* the power of breaking the entails, and of alienating their estates, was in error. The cases in the Year-Books show that fines had continued to be used, and were used especially as a means of conveyances to uses, by which the oppressive incidents of feudal tenure were avoided, and indirectly the power of devise of land by last will was acquired. This appears from a statute passed just *before* the present in the very same year, and which our author omitted to notice, although its bearing upon the main and most important application of fines — viz., as conveyances to uses — is manifest. To understand it, it is necessary to bear in mind that if a tenant *in capite* died leaving an heir under age, the king could seize the person and estate as under ward (3 *Hen. VI.*, fol. 5; 1 *Hen. VII.*, fol. 28). The importance of the provision enacted by this statute was greatly overrated by the historian, owing to his not having been aware that fines and recoveries had been used for purposes of transfer or alteration of title. The substance and essence of both modes consisted in publicity and notoriety, so as to afford notice to all parties interested to come forward and make their claims; and if they did not do so within a year, they were forever barred. The object of publicity was carried out, as to recoveries, by public proclamations, required by the practice of the courts, and as to fines, by the reading of them in court, as required by statute, either because this was not found effectual to give notice, or because in turbulent times men often were unable to come forward and make their claims. A statute of Edward III. enabled them to do so at any time; but this only did away with the effect of non-claim, and enabled them to make their claim. The success of their claim would depend upon the common law, according to which parties to the fine and their heirs would be barred; and even as to strangers, it was by no means clear how far they could contest the operation of the fines if the parties to it had a freehold estate at the time it was levied. However, such was the state of the law; and it had been found certainly that a great many titles were unsettled owing to the possibility of litigation. The present statute did no more than require, on the one hand, that the fines should be repeatedly and publicly proclaimed, so as to ensure such publicity as would afford ample notice to all who were interested in the title to come forward and oppose; and then guarded, on the other hand, that after five years' non-claim all persons should be finally barred. The principle thus carried out was the *ancient* principle of public notice, and record or registry of an indefeasible title.

years. Henry saw that the consequence of a free power of alienation would be a gradual decline of the wealth and importance of the nobility, and a proportionate increase in that of the crown; and knowing how much this concurred with his favorite scheme of aggrandizement, he procured the statute of fines to be passed (a).

Those who are of the latter opinion, deny that this statute was dictated by political reasons; and maintain that considerations arising from the nature of a fine, as a common assurance of the realm, were the only motives for making it. By the statute of *modus levandi fines*, 18 Edward I., claim must be made within a year after the fine levied by the person next immediately having right, without permission to those in the subsequent remainders to claim on his default; so that if there was tenant for life, remainder for life, remainder in fee, and the first tenant for life aliened, and the next remainder-man for life made no claim, the remainder-man in fee was without remedy. This mischief was one of the great causes of making stat. 34 Edward III., c. 16, by which non-claim was ousted;¹ that is, a person's right was no longer barred by his not making his claim within the year. An example of this kind had been given by the statute *De Donis*; the interest of the donor was there provided for by the clause much in the nature of this: it was ordained that it should not be necessary for the heirs in tail, or for those in reversion, to put in claim. Great cause of the statute of non-claim was the interruption of foreign and domestic wars, which prevented people from attending to matters of property.

Whatever wisdom may be ascribed to the policy which dictated that statute, it was found that this doctrine of non-claim had very mischievous consequences. Fines, as they thus lay open to be questioned, became of less validity and effect, and were virtually very little more

(a) This statute, however, no doubt was of great practical importance, for the fine or recovery could not be questioned as between the parties and their privies, so that it bound the issue in tail; and the effect of the statute of non-claim was, by limiting the period within which the fine could be questioned by any one, to go far to establish their validity as against everybody. Nevertheless, the change was not by any means so sudden or so sweeping as was supposed by the historian; and here again is an instance of the way in which history is illustrated or corrected by law.

¹ *Vide* vol. iii., c. xiii.

than feoffments of record. To remedy the endless contests and litigation to which estates were now exposed, and to restore fines to their former efficacy, were, as it should seem, the principal objects of stat. 4 Henry VII. The makers of this act appear only to have pursued the reason of the common law, and to have intended merely to put fines into the same condition they were in before non-claim was ousted.

Such are the reasons and motives suggested by different persons for making this famous act. It must be confessed, that if there was any intention of giving to a fine the efficacy of barring an entail, the statute is couched in those covert and indirect terms which indicated an apprehension of some remaining prejudices in favor of entails: for, without any apparent reference to entails, or the declaration of the statute *De Donis*, that fines, as against the issue, should be void, it enacts generally, "that fines of land levied with proclamation shall conclude *as well privies as strangers*." On the other hand, there is in the preamble mention made of the stat. 27 Edward I., *De Finibus*, and of the confusion introduced by the statute of non-claim, to remedy which it would intimate the present act was designed; and it was not till near forty years after that a fine with proclamation was held to bar the issue, by construction of this act;¹ and that was with such difference of opinion that an act was purposely made some years after² to declare such a fine to be a bar to the issue (*a*). It may be added, that this act is only copied from one passed in the reign of Richard III., who had no leisure to devise schemes for impoverishing or humbling the nobility. This republication, therefore,

(*a*) In that case, it was held that if tenant in tail levied fine with proclamations, and the five years passed in his life, his issue should be bound by the statute Henry VII.; *et sic vide*, that this statute and the stat. 32 Henry VIII., 36, are of the same effect, and that the one is the explanation of the other, and that by the one and the other privies shall be bound immediately after the proclamation; and the *five years are for strangers* (19 Hen. VIII., fol. 9). That was entirely in accordance with legal principle, for records always bound parties and privies — that is, privies in right or estate; and upon this principle the validity of all recoveries and fines depended. The statute was not necessary to make fines bind the heirs of the consors; it was only necessary to bind strangers, or persons *not parties* to the fine, and for their benefit the five years were allowed.

¹ 19 Hen. VIII., 6.

² Stat. 32 Hen. VIII., c. 36.

can hardly be attributed to any personal design originating with the present king (*a*).

Fines levied according to this statute, and to have the effect here given them, were to be solemnly read and proclaimed in the three terms next following the engrossing, at four days in every term, during which proclamation all pleas were to cease. There is a saving of the rights of such as might not be in a condition to vindicate their claims, such as *femes covert* (not being parties to the fine), persons under twenty-one years, persons in prison, out of the realm, or not of whole mind, at the time of the fine levied, not being parties to the fine; and a saving to every person and his heirs, other than the parties thereto, of such right as he had at the time of the fine being engrossed, so as he pursue his title within five years next after the proclamation had; and saving to all persons such right as shall first grow, remain, or descend, or come, after the fine engrossed and proclaimed, by any gift in tail, or other cause, before the fine levied, so that they pursue their right within five years after it accrued to them (*b*); and then they and their heirs might have an

(*a*) This notion, which is borrowed from Hume, who took it from Bacon, is purely fanciful, and refuted by the facts of history. Recoveries had been used for ages to bar entails, and so far from this act being intended to have that effect, it was doubtful whether it had such an effect, and the judges were divided about it. The matter was settled by a statute of Henry VIII. forty years afterwards. In the next reign a great question was agitated before all the judges, which was thus: Tenant in tail levied a fine of his land with proclamations, and the five years passed during his lifetime, and afterwards he died; and the question was, whether his issue should be barred by that fine or not. Some judges thought not, upon the clause saving such rights as should descend after the fine. For they thought that although the father was privy to the fine, yet the issue was neither party nor privy, for he claims the land by the donor, and not by the donee. But the majority thought otherwise, for the intent of the statute was that the fine should be a final end. And if there had been no exceptions, it would conclude all persons generally, and the issue in tail was not within the exceptions as to strangers to the fine, but parties taking in remainder or by some new estate in tail. And the intention of the statute was not that such a claim by *the same title*, but that the ancestor who levied the fine, should be aided, *for such issue in tail was privy to the fine levied by his ancestor, through whom he should make his descent*, although he was not party to the fine; and all privies were concluded by the fine; and so such issue in tail should be barred (*Dyer's Rep.*, 19 *Hen. VIII.*, fol. 3). This would be so at common law, and therefore it will be seen that Lord Bacon was right in holding that this statute was in affirmance of the ancient common law. The matter was settled by a statute of Henry VIII. forty years afterwards.

(*b*) A fine was levied by tenant in tail after this statute, and proclamations passed, and the five years elapsed; and after the tenant in tail died, it

action against the pernors of the profits of such lands. But if at the time of such right accruing they were covert baron, within age, in prison, out of the land, or not of whole mind, then their right and action should be reserved to them and their heirs till they come to twenty-one years, be out of prison, within this land, uncovert, and of whole mind, so that they or their heirs take their action or entry within five years after such disability removed, and pursue such action or entry. All persons having a right, and being under the above disabilities at the time of a fine being levied and engrossed, shall take their action or entry within five years after such disability is removed, and pursue such action and entry: if not, they and their heirs shall be barred forever, as if they had been parties or privies. There was a saving to every one, not party or privy, to allege in avoidance of a fine, that neither the parties, nor any to their use, had anything in the lands or tenements comprised in the fine at the time it was levied. Lastly, it was provided, that fines, levied in the form used before this act, should be as effectual as if this statute had never been made; and all

was doubted if the issue should be barred as privy, because he had made his conveyance by his father, or because he should not be reputed privy, because he claimed *per formam doni*; and then the right should be saved by the second saving, because he was the first to whom the right descended after the fine was engrossed (*vide* 32 *Hen. VIII.*). But it was agreed that if he to whom remainder in tail or other title first accrued suffered the five years to elapse without claim, that this *laches* of the ancestor would bar the fine (*Dyer's Rep.*, 3). Long after the act was passed, a question arose on a fine levied in the next reign, whether each heir of the party barred should have five years, *devoir* after coming of full age, and it was held otherwise; for that if that were so, the claim might be kept alive for hundreds of years. Therefore it was held that heirs, though not of age, were barred after the five years, and that there was not a new right as each heir came of age. And it was said, whoever considers that this act was made for the general tranquillity and quiet of inheritances throughout the realm will not think this construction hard (*Stowell v. Zouch, Plowden*, 371). In the reign of James I. it was held, partly on the authority of a contemporary "reading" in the statute by Catlin, one of the judges, that a lease *in futuro* was barred by five years' non-claim if it commenced before they expired, but otherwise not (*Suffyn v. Adams, Cro. Jac.*, 60). The court there said that the statute extended to the interest of a term expressly, for they be one equal mischief, as a sleeping lease of a thousand years shall bind the purchaser as well as a sleeping right or title, and therefore there is as great reason to bar it as any other right; and it is not like to rent or common, for a term is an interest in the land whereof the fine is levied; but the others are collateral, and the fine is not levied of them. But a fine levied before the beginning of a term shall not bind if he makes his claim within five years after his title comes *in esse*; but if he makes it not within five years afterwards, he shall be barred (*Ibid.*).

persons should be at liberty to follow that form, or the form prescribed by this act.

Such are the provisions of this famous statute, which is one of those instances where the old law, after some changes, was revived, and one of the principal assurances of estates placed upon its ancient foundation. This statute, whether considered as a regulation for quieting possessions, or for barring entails, became in after-times an object of very frequent and very serious discussion.

The inconveniences arising from the universal practice of conveying land to uses were felt more and more; and the legislature were frequently struggling to remedy, if possible, the extreme difficulties under which creditors and purchasers, lords, and those who had title, labored, from the secret and dormant claims to which land became thereby subjected (a). With a view

Statutes of per-
nors of profits.

(a) There is an intimate connection between this subject and that of uses; indeed, they are portions of the same subject, and had better have been treated together, for the statute of Marlbridge VI. speaks of those who made feoffment, to the intent to enfeoff their heirs at full age, when the feoffees took the profits, and also the statutes which gave actions against the pernors of profits, prove that uses were at common law, for the *pernancy of the profits was a use* (27 Hen. VIII., fol. 8). Uses were at common law before the statute of *quia emptores*, though uses were not common before that statute. Upon any feoffment before the statute, there was tenure between the feoffor and the feoffee, which was a consideration for the feoffee being seized to his own use; but since the statute, the feoffee held of the chief lord, and then there was no consideration between the feoffor and feoffee, without special matter. And so the statute of Marlbridge VI. was that the feoffment by the father, who held in chivalry, made to his son, by covin, did not deprive the lord of his wardship; and in those cases the lord, after such feoffment, took the profits of the land all his life (24 Hen. VIII., Bro. Abr., *Feoffment al Use*, fol. 40). The statute of Richard III., c. i., provided upon this principle that all gifts, feoffments, etc., of the *cestui que use* should be good, and this was applied to alienations for the benefit of creditors — that is, conveyances to hold until the debts should be paid, and no recovery by the heir could disturb the conveyance until the debts were paid (3 Hen. VII., fol. 13). A use was, it will be seen, nothing but the right to the profits, for a use was no possession at common law (21 Hen. VII., fol. 21), but as the use or receipt of the profits was the reality and substance of possession, the tendency of legislation was to make it equivalent to legal possession, as against the *cestui que use*, until in the next reign uses were declared to oust the legal possession. Many interesting illustrations of the effect and operation of estates-tail, and recoveries to alter them, are afforded by a case which came before the courts long afterwards as to a "recovery to uses" effected in this reign. In that case it appeared that one Gomerley, seized of the manor of Nayland, in the 25 Edward III., gave it to Lord Scrope and the heirs of his body, who died seized; and so it continued by descent until the 4 Henry VII., and then Thomas, Lord Scrope, suffered a common recovery to the use of him and his heirs, and retook such an estate to himself from the feoffees, and had

to remedy these evils, the number of statutes against per-
nors of profits was increased in this reign.¹ It was pro-
vided, by the very first statute in this reign, that *cestui*
que use should answer to a formedon, and the suit be con-
ducted in the same manner as if he was seized of the land.
It has been doubted by some whether a formedon did not
lie before this statute.² A like redress, similar to that of
the statute of Marlbridge,³ was provided in favor of the
lord, who was enabled, by stat. 4 Henry VII., c. 17, to
establish his right to wardship and relief against the heir of
cestui que use, if no will was declared (a), as if the heir were
very tenant; and the heir, on the other hand, was furnished
with means of redress against the lord for waste com-
mitted, and was entitled to damages against him, if barred
in a writ of ward. By stat. 19 Henry VII., c. 15, the
sheriff is authorized to make execution of the lands, ten-
ements, or hereditaments of *cestui que use*, the same as if
he was seized thereof, for all judgments, statutes, and
recognizances. Lords of whom such lands were held in
socage were, on the death of *cestui que use*, and no will
declared, to have their relief of heriot, and other dues.
On the other hand, *cestui que use* was to have all advantage
against the person suing the execution, as if he was seized
of the land. If a bondman purchased any land or tene-
ment, and made an estate to others to his use, the lord
was enabled to enter, the same as if the bondman was
seized of the land.

issue two sons, one of whom made a feoffment to the use of himself and his
heirs, and in the 7 Henry VIII. devised it to the other son for life, and
afterwards to the use of the *right heirs* in perpetuity, "according to the
ancient evidences." The case came before the courts in the latter part of
the reign of Elizabeth, and it was held that this meant the heirs generally,
according to the course of the common law (*Ross v. Morris*, Cro. Eliz., 108).

(a) The statute enacted that if a man made conveyance of lands he held
by knight-service to the use of himself and his heirs, and no will was declared,
the lord should have the heir in ward, as if the tenant had died seized. This
impliedly recognized the right of the tenant to declare his last will, so as to
bind the feoffee to uses; in other words, the legal deviser, who would be com-
pellable in equity to hold to the use of the law. The effect would be that the
lord would lose his wardship (though if the feoffee died, the lord would have
the wardship of his heir, within age), and to remedy that, and that alone,
was the object of this statute, which impliedly recognizes the right of the
owner of land to alienate his land by last will by means of uses; so that,
through the medium of uses, alienations by will had been established long
before the statute of calls.

¹ Vide vol. iii. ² Bro., *Pernor des Profits*, 14. ³ Vide vol. ii., c. viii.

There was another statute made concerning real property, which deserves notice. It was found necessary to remedy an abuse that had been practised by widows while in possession of their dower, or of what has since been called a jointure. They were in this manner seized of the freehold, and consequently of all the privileges annexed to it; and could therefore exercise a right over it, which laid those next in succession quite at their mercy. To prevent this, it was enacted, by stat. 11 Henry VII., c. 20 (a), that if any woman, having an estate in dower, or for life, or in tail, jointly with her husband, or solely to herself, of the inheritance or purchase of her husband, or given by any of his ancestors; if a woman, having such estate, should, either when sole, married to a second husband, discontinue, alien, release, or confirm with warranty, or by covin suffer a recovery, it shall be void; and the person next entitled, after the woman's death, may enter and enjoy the land the same as if such woman was actually dead. There is a provision, that a woman may alien for her own life, and if the person next entitled agrees to it, she may alien for any greater estate. However, the widow was prevented from making a property of that which had been allotted to her for an honorable provision during life; and the reversion to the heirs of the husband and his family was effectually secured.

Alienation of
jointresses
made void.

There is only one statute relating to the right of personal property, which much deserves our notice; that is, stat. 3 Henry VII., c. 4 (b), which was made to prevent

(a) See the statute copiously expounded in the case of *Wimbush v. Talboys*, *Plowden's Reports*.

(b) This deserves more particular attention, as the first of a series of enactments, many of them in statutes as to bankruptcy, which commenced in the next reign, passed against conveyances in fraud of creditors. It was an act to provide that all deeds to defraud creditors shall be void, and it recited that deeds of gift of goods and chattels had been made with intent to defraud creditors of their debts, and that the persons who made such deeds of gift went into privileged places, and there lived with the said goods, the creditors being injured. And it was enacted and established that all deeds of gift of goods and chattels made, or to be made, in trust, and to the use of the persons who made the deed, should be void, and of no effect. It is to be observed that the statute says, enacted *and established*, whence it may be suggested that it was considered a declaratory act, in affirmance of the common law; and there is reason to believe that it was so, for, though it had been held that a debtor might assign his goods to avoid an execution, that meant where he really *had* assigned them — *i. e.*, with intent really to transfer the

the frauds committed on creditors by persons, who, having made deeds of gift of their effects, would fly to sanctuary and other privileged places, and there live upon their property, in defiance of those who had demands on them. It was enacted by this statute, that all deeds of gift of goods and chattels in trust for and to the use of the person making them, shall be void.

We shall now speak of such statutes as made any alteration in the course of administering justice. These were not many; but yet, together, contributed either to render the means of obtaining justice more ready, or delays less incommodious. They related to writs of error, popular actions, suits *in formâ pauperis*, attaints, and the process in actions upon the case.

It was intended by stat. 3 Henry VII., c. 10, to prevent a litigious stay of execution by writ of error (a). It ordains, if a defendant or tenant brings a writ of error, and the judgment be affirmed or the writ be discontinued,

property and the interest, which was not the case where he merely conveyed colorably, with intent to reserve the real use and benefit to himself. Various subsequent statutes followed out this one, 13 Eliz., c. v.; 27 Eliz., c. v.

(a) This deserves attention as the first of a series of statutes passed to prevent wrongful litigation for the mere purpose of delay and vexation. It was so strong a principle of the common law that litigation ought not to be encouraged, that even a writ of error was not a *supersedeas* of execution in itself (*Year-Book*, 18 Edw. IV., fol. 8). So that the plaintiff could still sue out execution on the judgment, if he chose to run the risk of its being reversed, in which case he would be liable to writ of restitution. If the defendant, when he served the writ of error, desired to stay execution, he was required to sue out a writ of execution (7 Hen. VI., fol. 42). There was, however, apparently some doubt upon the point, and, moreover, even if the right to issue execution was clear, a plaintiff might well hesitate to do so while a writ of error was pending, and, at all events, there would be vexation, if not delay. Hence this statute; after which a practice rose up to allow a *supersedeas* of execution (*Vide Dunford v. Ellis*, 2 Mod., 138; *Dighton v. Granville*, 4 Mod., 24). The statute recited, as the mischief, that writs of error were sued with intent only to delay execution, etc. The object of the statute was preserved by several subsequent acts, as 3 James I., c. viii., an act to avoid unnecessary delays of execution, enacting that no execution shall be stayed or delayed on any writ of error or *supersedeas* thereon, in any action of debt on any bond or obligation for payment of money only, or any action of debt for rent, or upon any contract, unless the person in whose name error shall be brought with two sufficient sureties, such as the court wherein such judgment shall be given shall allow of, shall first, before such stay made or *supersedeas* be awarded, be bound unto the party for whom such judgment is given by recognizance, to be acknowledged in same court, in double the sum adjudged to be accorded by the former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay, if the judgment be affirmed, all the debts, damages, and costs to be awarded (3 Ch. II., c. iv.; 16 and 17 Ch. II., c. viii.).

or the plaintiff in error nonsuited, he shall pay costs and damages to the other party for the delay and wrongful vexation, by discretion of the court where the writ of error is depending.

The stat. 4 Henry VII., c. 20, respecting popular actions, as it had a view to the emoluments of the exchequer, bore in it a striking mark of the genius of this reign. It had become the practice of government to enforce with rigor such penal laws as contributed to the increase of forfeitures and penalties; and everything which prevented the full effect of such laws was to be removed (*a*). It was common for offenders to get a friendly action brought against them for the penalty they had incurred; or if an adverse plaintiff had commenced a suit, they would get a friend to sue them, and by this collusion would confess a judgment to him, and plead that in bar of the other action. To prevent the effect of such practices, it was provided by this statute, that in the like cases the plaintiff may reply *covin*, and have judgment and execution as if no other action had been brought; and where the collusion is proved on the defendant, he is to suffer imprisonment. It is further provided, that no release of any popular action by a private person should be a bar to such action or indictment. Collusion was not to be replied, where the point of the action had been tried, and a verdict had.

Allowing persons to sue *in formâ pauperis*, as was done by stat. 11 Henry VII., c. 12, was a humane constitution, and resembled more the legisla- Suits in formâ pauperis. tion of an imaginary republic than the practice of actual governments. It was ordained, that every poor person should have original writs and writs of *subpœna* without paying for the sealing or writing thereof; and the chancellor was for that purpose to assign clerks, learned coun-

(*a*) The king, says Lord Bacon, made a statute, monitory and minatory, towards justices of the peace, that they should duly execute their office, inviting complaints against them, — first, to their fellow-justices, then to the justices of assize, and then to the king and chancellor; meaning also to have his laws executed, and thereby to reap better obedience, or forfeitures; wherein, towards his latter time, he did decline too much to the left hand. He did ordain remedy against the practice that was grown in use to stop and damp informations upon penal laws, by procuring informations by collusion to be put in by the confederates of the delinquents, to be jointly prosecuted, let fall at pleasure, and pleading them in bar of the information; which were prosecuted with effect (p. 45).

sel, and attorneys (*a*). If the writ was returnable before the justices of any court of record, they were also to assign counsel and attorneys, to act without a fee. This indulgence may, however, be thought by some to be dangerous, and to need that caution and restriction which by a later act has been annexed to this privilege. To enable one to commence a litigation without expense, is tempting the resentments of men with too easy a gratification; and the defendant in such a suit is left in an unequal contest.

Attaints, though in the nature of a criminal proceeding, may be mentioned in this place among the improvements made in civil process; as they were designed for the purpose of rendering the trial by jury as incorrupt and effectual as the nature of it would allow (*b*). It was now endeavored to put attaints upon a

(*a*) There is no doubt that this statute was passed really in order to encourage and facilitate actions by informers upon penal statutes, which, as Lord Bacon points out, were very numerous, and promoted to the utmost by the king. In that view, the statute would partake of the crafty and astute character of Henry, and be in consistency with the general scope and spirit of his times and of his whole policy. For it is obvious that mean and needy persons might be more likely for the sake of gain to undertake the obnoxious office of informers. The effect of the statute was to encourage poor persons to make the penal statutes a source of gain to themselves, as the king sought to make them a source of gain to himself.

(*b*) The proceeding by attaint was extremely perilous and rigorous at common law. It had its origin in the original system of trial by jury, under which the jury were witnesses, and found verdicts of their own knowledge; so that, if they found falsely, it might be presumed that they found so wilfully. Some traces of this system have thus lived even to our own times. It is very ancient law, although, until lately, it had become somewhat obsolete, that a jury may find a verdict on their own knowledge, without evidence as to matters of a public nature, as customs or usages of business, or the like. Thus, issue upon prescription, the jurors say their ancestors do not know the contrary, nor have any information to the contrary, and find the prescription, it is a good verdict (*Year-Book*, 34 *Hen. VI.*, 36). So, in another case, it was said, "evidence is not given, but to inform them (the jury) in their conscience of the right; (and) *though no evidence was given of any part, or they will not give evidence, yet they are to give verdict on one side or other*" (*Vavisor, J., Year-Book*, 14 *Hen. VII.*, 29). Indeed, in the origin of trial by jury, it was mainly for the sake of the personal knowledge of the jurors that they were impanelled, and hence they came from the very *vill* where the matter arose (*Styles*, 238; *Trial per Pais*, 209; *Salb.*, 405). The general principle embodied in the ancient procedure by attaint was, that there ought to be a remedy for a false verdict, at all events, in *civil* cases. (The common law had provided no such remedy in criminal cases, from the obvious difficulty of delaying the execution of criminal justice pending any procedure by way of appeal; but it was in this and in subsequent reigns sought to apply a remedy by means of the arbitrary jurisdiction of the Star

different footing than they had been on before. Attaints had become very dilatory, lasting sometimes ten years,¹

Chamber.) The particular remedy provided by the common law was penal, because the jurors originally were witnesses, and gave their verdicts of their own knowledge, and so that it was assumed that verdicts which were false would be wilfully false, and even if wrong, wrong in law. As they were bound either to take the direction of the judge, or return a special verdict, it was considered that their verdict was perverse, and so wilfully wrong. Hence attain lay in all actions, real or personal (*Year-Book*, 34 *Hen. VI.*, fol. 13; and 35 *Hen. VI.*, fol. 44). A verdict for the party bringing the attain disaffirmed the former verdict (35 *Hen. VI.*, fol. 19; 36 *Hen. VI.*, 31), though the pendency of the procedure did not delay the execution (33 *Hen. VI.*, 21), as it was a proceeding against the jurors, not like bill of execution or writ of error against the opposite party. The foundation of the proceeding was supposed to be false oath on the part of the jurors (35 *Hen. VI.*, 21). If in an action on a deed the defendant denied it, and it was found against him, he could sue in attain (34 *Hen. VI.*, 30). So if in conspiracy or trespass the jury, upon not guilty, found against the defendant, with damages, he could bring attain, and assign the false oath in *omnibus quæ dixerunt versus eum* (*Year-Book*, 35 *Hen. VI.*, fol. 19). And in such a case, the judgment upon the verdict in attain in his favor would be, that he should be restored to all he had lost (*Ibid.*). The language of all the cases clearly shows that the basis of the proceeding was wilful error or falsity in the jurors—that is, a verdict wilfully wrong. Thus it was said, in one case, that they were not bound to inquire of matters out of their own county, because they could not have true knowledge of such matters; and, on the same principle, they were not bound to find as to matters beyond the time of memory, but yet they might find a deed made, though before the time of memory, if it were duly sealed and written, and there were no circumstances of suspicion, as this was great evidence (39 *Hen. VI.*, fol. 8). But on an issue or a prescription, if there was any evidence to show that it was since the time of memory, attain lay (34 *Hen. VI.*, fol. 31). It is obvious that the procedure was based upon supposed wilful fault, and that as to the facts it was based originally on the theory of personal knowledge only as applied to cases of verdicts on evidence. Trial by jury had become now fully and firmly established, and upon the basis of the modern system of giving verdicts upon the evidence, and not merely on the knowledge by the jurors; the result of which was, that verdicts might be false or erroneous, but not wilfully so. The procedure by attain, therefore, which was penal in the highest degree, involving forfeiture of goods and chattels, and liability to imprisonment, was utterly inappropriate. The jurymen had to hear such evidence as was offered, of matters of which they might know little or nothing; and they had to form the best judgment they could upon it; and among other things they had to consider was the credibility of the witnesses; for which reason it was still thought necessary that the jurors should come from the neighborhood where the parties and the witnesses lived and were known. Fortescue counts it as part of the advantage of trial by jury, that not only they hear the witnesses, but know them and their credibility; and not only so, but have knowledge of them even as to the matters in controversy. "These know all that the witnesses are able to depose; and know also the constancy and unconstancy of the witnesses, and what report goeth upon them. Doubtless there is nothing that may disclose the truth of anie double fallying in contention, which can in any wise bee had from such jurors, so that it be possible

¹ Stat. 11 *Hen. VI.*, c. 4. *Vide* vol. iii.

and were attended with great expense, as well as impediment, in the conduct of them. These considerations, with

for the same to come near knowledge" (c. xxvi.). This advantage of the knowledge of the jurors no doubt is great as to matters of a general nature, though as to particular facts it is not now recognized. But Fortescue is carried too far in his enthusiasm for trial by jury when he says that "this forme of proceeding cannot in anye cause fayle for wante of witnesses; nor the testimonyes of witnesses (if anye bee) cannot choose but come to their due end and effect" (c. xxxi.). And there is reason to believe that the failures of justice through erroneous conclusions on the evidence or failure of proof were numerous. At this time, however, though the system had so far advanced towards its present form, that juries tried cases, partly at all events, upon evidence offered to them, it was found that verdicts often gave great dissatisfaction, as being contrary to the evidence, even though not wilfully false, as men's minds might honestly form erroneous judgment on evidence presented to them. Hence the desire for some less cumbrous and rigorous mode of redress for a false verdict; and thus the present act. The procedure by attain, however, was primarily penal, and somewhat perilous to the party complaining. It may be illustrated by an instance of it which occurred in one of the last years of this reign. One Gainsford, of Gray's Inn, and others, brought an attain against Gilford and others (the jurors) upon a false verdict in an action of trespass brought by him of assault and battery, in which the jury had found a verdict for the plaintiff for both assault and battery, with £40 damages, and they — *i. e.*, Gainsford and the co-defendants in that action — assigned false oath on both points. Evidence was given to the second jury (which, by the practice, consisted of twenty-four) for five hours and more, and, in the result, they found partly for Gainsford and partly against him; for which he was amerced. As to the rest, the judgment was, that the first jury on the original trial be outlawed, etc., and that Gilford be taken (20 *Hen. VII.*, fol. 4). The indirect result was, that there being a judgment that the first verdict was false, of course the judgment why was given upon it, and reversed. The ground of the attain was the wrong done to the party by the false verdict. It was a penal proceeding against the jurors, but it was also against the party in whose favor the false verdict was given (*Sir W. Norrey's Case*, 14 *Hen. VII.*, fol. 1), not indeed for any penalty as against him, but because the effect was to set aside the former verdict. The jurors were punished, and the cause of their punishment and the ground of the attain was the wrong done to the party by the false verdict (14 *Hen. VII.*, fol. 5). The common-law procedure by attain was highly penal, involving forfeiture of all property, fine, and imprisonment, and hence it was not extended beyond its strict scope, which was confined to real actions; and though there were the same evils in personal actions, the procedure was not at common law applied to personal actions (14 *Hen. VII.*, fol. 14). The complaint being grounded on a false verdict, of course the only real redress would be to get rid of it. In one of the numerous cases of attain which occurred in this and the next reign, it was said by the court that the action of attain was to reverse the first judgment, and to be restored to what the party had lost (19 *Hen. VIII.*, fol. 6); but this could not only be as against the other party, and so if he had died, the remedy was lost (*Ibid.*). After this statute, it was held that if attain was a proceeding so penal, it could not be taken by the equity of the statutes on the subject, but only in the cases provided, though it seems to have been considered that it lay at common law in personal action (14 *Hen. VII.*, fol. 13), as various statutes allowed it in other actions. The numerous cases on the subject in the Year-Books show that it was a subject of some importance in those times. The principle was that

that of the extreme rigor of the villainous judgment, induced persons rather to endure the injury they received from a false verdict than be at the trouble of redressing themselves in this manner, or contribute towards inflicting so cruel a punishment. As a substitute for the ancient severity, a new order of proceeding and another penalty was contrived by stat. 11 Henry VII., c. 24, which ordained a pecuniary mulct instead of the opprobrious judgment of the common law. This statute being intended as an experiment, was temporary, and after several continuances of it in this reign, expired with it: in the next, a new one was made on the same subject.¹ Another temporary law had been made at the same time against perjury, maintenance, embracery, and corruption of officers;² crimes of the like nature with the corruption of jurors, and punished by numberless provisions in our early laws.³ A particular act was made to correct the evil of corrupt jurors in the city of London, who heretofore were not liable to an attaint. It was provided by this act, that jurors there should have certain qualifications of property, and that, on a false verdict, a bill of attaint might be sued in the hustings: if the jurors were convicted, they were to be fined £20, or more, at the discretion of the court;⁴ so that all idea of the villainous was entirely abandoned.

As actions upon the case had of late very much increased, and had supplied the place of many ancient remedies, it was thought they should no longer be subject to the delay which was incident to the old process (a). It was there-

a verdict of twelve jurors should be taken to have been right until the contrary was shown (5 *Hen. VII.*, fol. 22); and therefore the jury in an attaint was composed of twenty-four jurors, as otherwise their verdict that the first verdict was false would not countervail the former verdict.

(a) In this reign the old real actions began to be superseded by the new actions on the case. Thus where a man brought an action on the case, and complained that he had had a mill from time immemorial worked by a certain stream, and that the defendant had stopped the water from flowing to it. On the part of the defendant it was objected that the proper remedy was an assize of nuisances; but it was held that the action on the case would lie (21 *Hen. VII.*, fol. 30). The great advantage of the real action was, that the remedies were *specific*, and gave specific relief. Thus in the writ "of being quit of toll," the crown commanded the defendant to permit the parties suing it to be quit of toll, and not molesting or in any way aggrieving them (*Fitz-*

¹ Stat. 23 *Hen. VIII.*, c. 3.

² 11 *Hen. VII.*, 25.

³ *Vide* vol. ii.

⁴ Stat. 11 *Hen. VII.*, c. 21.

fore enacted by stat. 19 Henry VII., c. 9, that the like process should be in actions upon the case, as in actions of trespass and debt, when sued in the king's bench or common pleas; for those only are mentioned in the statute (a). It should seem that actions upon the case in other

herbert's *Natura Brevium*, 227). Although it might be added, "releasing to them the distresses, if you shall have made any upon them" (*Ibid.*). So of the writ *ne injuste vexes*, to prohibit the landlord from distraining for more rent than was due (*Ibid.*). So in the old writ of *quod permittat*, by which the defendant was commanded to permit the suitor to pull down a house, or wall, or hedge, or fill up a ditch, or make broad a way which the defendant had wrongfully narrowed, or to draw water at a well, as he ought and had been used to do; or to water his flock at the water, etc.; or to have a certain way over the land of the defendant; or to have a free fishing in his waters; or to erect ladders on his soil for repairing his houses as often as need be, and as he ought and had been used to do, etc. So of most other of the old remedial writs. The disadvantage of the old real actions was, that that process was dilatory, added to which, they only lay by or between the possessors of the freehold. For various reasons, therefore, actions on the case became more frequent, even in cases relating to injury to land or houses, provided the injury was not done by the defendant upon the soil of the plaintiff; in which case action of trespass lay (13 *Hen. II.*, fol. 26). Action on the case for such injuries lay where the defendant, on his own land, or the land of others, did what caused a consequential injury to the plaintiff's land, as stopping of streams, obstruction of light, etc. (22 *Hen. VI.*, fol. 14). So the action on the case for personal injuries in regard to personalty, where neither trespass, nor the tort, nor covenant, or debt in cases of contract would lie. And as civilization advanced, and property increased, and terms and tenancies for years became more numerous and valuable, and buildings multiplied, and trade increased, these classes of actions became more numerous and more important; and hence the importance of process as speedy in these actions as in trespass or debt. For this is the real meaning of the statute; that there shall be the same process as in those actions in the king's bench or common pleas, not that there should be only such process in those courts as the author appears to have supposed. That process was, on non-appearance, *capias* to enforce appearance (5 *Edu. IV.*, fol. 41), and, in default, outlawry (21 *Hen. I.*, fol. 50).

(a) Regularly at common law a *capias* only lay upon trespass *vi et armis*, which in those days implied actual force and violence which would be indictable, and for which, even in an action, the king had a fine. The *capias* and process of outlawry upon it were given by acts of parliament in actions of debt, detinue, account, and, by the above statute, in actions on this case. But these statutes left it open when or how the *capias* should be issued, which, it is obvious, would follow the course of law already established in actions in which *capias* lay at common law. And it appears clear that in such actions the sheriff first returned on the summons of distress, *non est inventus* and *nihil habet*, and then a *capias* issued (3 *Edu. III.*, fol. 3; *Jenkins' Centuries*, fol. 123). At common law the first process was summons; and if the sheriff falsely returned that the party had been summoned, writ of deceit lay against the sheriff (*Ibid.*, 122). But in the original action, the return could not be disputed. That the process of arrest only lay properly upon default of appearance to summons is shown thus: that the remedy upon failure to arrest was outlawry, and there could be no outlawry except upon an original writ, upon which the process was summons; and in such original writ the place

courts, not being affected by this statute, must be prosecuted with the common-law process of attachment and distress, as before.¹

Among the provisions for improving the administration of justice, we must reckon a statute for correcting some abuses in the sheriff's court. There was great extortion and collusion practised by under-sheriffs and their clerks, and bailiffs; the principal of which was, the entering of plaints without the consent of plaintiffs, and sometimes where no such person existed; after which they omitted to attach or summon the defendant, but left him to incur defaults, for which they made great levies upon him. To remedy this, no plaint was to be entered without pledges being found; a penalty of forty shillings was imposed on the sheriff if he entered more than one plaint for one trespass or debt. The party grieved might complain to a justice of peace, who had authority to punish the sheriff and his officers; several other directions were given for submitting this mischief to the correction of the justices of the peace.²

The alteration made in the law of crimes and punishments in this reign seems as remarkable, and of as extensive consequence, as any alteration respecting the law of property. The criminal code begun now to assume a sanguinary appearance, which every reign since has been heightening.

The changes made in our criminal law consist either in the new crimes which the legislature created, or in such regulations as were made for the administration of justice.

One treason was created in this reign. By stat. 4 Henry VII., c. 18, it was made high treason to counterfeit the coin of any foreign realm permitted to be current here (*a*).

or habitation, then or lately, ought to be inserted (4 *Edw. IV.*, fol. 90); for at such place the sheriff summoned. Now the statutes only superadded *capias*, and did not dispense with summons, the truth being, that *capias* was for default of appearance upon summons.

(*a*) There is no head of criminal law in which there has been earlier or more frequent legislation than this. In the reign of Edward I. a statute passed by which merchants were prohibited from importing clipped coin (20 *Edw. I.*). By another statute in the reign of Edward III., search was to be made for false coin imported (9 *Edw. III.*, c. i.). By another statute of that reign, it was enacted that money should not be impaired in weight or alloy (25 *Edw. III.*, c. xiii.). By another, no coin was to be current but the

¹ *Vide* vol. ii.

² Stat. 11 Hen. VII., c. 15.

Another act was made to prevent the circulation of clipped and base coin; in which the exportation of bullion to Ireland, or the importation of gold or silver coin from thence, is punished with imprisonment; that being the quarter from whence this commodity was most frequently conveyed to this kingdom.¹

The hunting in parks with visors and painted faces was punished by stat. 1 Henry VII., c. 7; and if a warrant was issued against such offender, and he wilfully concealed the offence, or resisted, or disobeyed the warrant, he was guilty of felony.

It was made felony by stat. 3 Henry VII., c. 2, to take away from a woman against her will unlawfully, whether she be maid, widow, or wife (a); and

Stealing
women.

king's; and any person might refuse foreign coin (27 *Edw. III.*, c. xiv.). This was followed by another in the reign of Richard II., enacting that foreign coin should not be current in this country (17 *Rich. II.*, c. i.); and in the reign of Henry V. a statute passed which first made it treason to clip or file the money of the realm (3 *Hen. V.*, c. vi.). By another statute of that reign gold was to be received as payment by the king's weight, whatever that was (9 *Hen. V.*, c. xi.); and by an act of Henry VI., the mint-master was to receive notice of the true value, whatever that was (2 *Hen. VI.*, c. xii.). Then arose the present statute.

(a) In the Year-Books of the reign is a case very illustrative of the necessity for this statute. It there appeared that one Margaret, a widow, was seized by a great number of men—about a hundred—and feloniously carried away; and that those who thus carried her away were pursued by another band of forty men—horsemen, well armed and arrayed in the manner of war—into another county, where the pursuers came up with the ravishers, and after a sharp conflict took them prisoners. But it should seem that after all the ravishers were not convicted, for some of them sued for malicious prosecution (*Keilway*, fol. 80). This statute, says Lord Coke, stands upon a preamble and a purview—the preamble is, whereas women having substance, and some being heirs-apparent, for the lucre of such substance be oftentimes taken by misdoers contrary to their wills, and afterwards married or defiled; and then comes the purview, that is, the enacting part. Upon this, he says, a great question was moved in the reigns of Philip and Mary, if the taking against the woman's will, without marriage or defilement, was felony within the act. And it was resolved that it was not so, for the mischief of the act was not only the taking, but the marrying or defiling, which was (as said in the preamble) to the disparagement of the woman, and utter heaviness and discomfort of her friends, and the purview ought to pursue the mischief (12 *Coke's Rep.* 21). The construction put upon this act affords a remarkable illustration of the strict restraining construction put by the courts of law upon penal statutes. This decision was arrived at, it is stated, upon a diligent examination of all the precedents which are referred to in the report. A case is cited also from 1 *Anderson's Rep.* 115, and 1 *Croke, Elizabeth*, 485, where it was held that if the women were neither married nor deflowered, the act did not apply. And it was laid down that the taking away would not of itself

¹ Stat. 19 Hen. VII., c. 5.

the takers, procurers, abettors, and those who receive such women, are all made *principal* felons. A woman so taken must have substance in goods or lands, or be heir-apparent, and must be married, or deflowered, to make the taking an offence under this act. There was a proviso that this should not extend to a person who took a woman, claiming her as his ward or bond-woman.¹

The last new felony we shall mention was inflicted by stat. 3 Henry VII., c. 14, which made it felony for any servant of the king, being enrolled in the check-roll, to compass or imagine the death of the king, or of any lord, or privy councillor, steward, treasurer, or comp-

support the indictment, even though it were with the intent to deflower; but that there must be a taking, and a taking of a woman having lands (being heir thereto) and the marrying or deflowering, in order to sustain the indictment (*Heb.*, 183). It will be observed that one or two of the precedents cited were after the statute of Philip and Mary as to taking away of girls under sixteen, which shows that the scope and purview of the two statutes were considered entirely distinct; and the cases cited show also the necessity for that further legislation on the subject which took place in the reign of Philip and Mary. Upon this statute it was held that the intent must have been either to deflower and distrain, or to marry for the sake of lucre; because the preamble of the act, it was thought (it being a penal act), did so restrain its meaning and operation. Thus if the female were not an heiress, and was taken away to be married, and was married to the defendant, the statute did not apply. Hence it appears that the indictment under the statute always either alleged such an intent, or set out the preamble of the statute, and alleged an offence within it, which came to the same thing. And in a case where, it being alleged that the prosecutor had one daughter of the age of twelve years, or thereabouts, and having lands and goods, the defendant caused her first to be allured away, and then by force and threats carried away, and married her; and it appearing that she was not then heiress, as there was a son, it was held that the case was not within the statute. "For though the words of the purview appear general to all women, taken unlawfully and against their wills, and this woman, though first allured away with her consent, was afterwards by force carried away, it was considered that the preamble of the statute could not be thought to be idle, but meant to restrain the purview to the particular cases of the preamble in the enumeration of the women and their estates and conditions, and also the motives and ends of their taking—that is, that they should be maids, widows, or wives, that had substance in goods or lands, or should be heirs-apparent; that the motive should be lucre, and the end to marry or deflower, and the purview following—'that what person should take a woman so against her will, unlawfully,' etc., it was conceived that the word 'so' did implicitly bind up the preamble in the purview, or else the word were idle if it did not include the motive and end of the action, which is a part of every action, as being the cause of it, which, in this case, were lucre and luxuriousness. And that was also conceived to be the meaning of the law, as being like to be the common case, for men will not commonly steal women that are nothing worth" (*Burton v. Morris*, *Hobart's Rep.*, 182).

¹ *Vide ante.*

troller of the household. This offence is to be inquired of by twelve persons, enrolled in the check-roll, before the steward, treasurer, and comptroller of the household. The punishing the bare intention to murder a lord, without any overt act declaratory of such intention, makes this a very remarkable provision; the security of these personages being put on the same footing with that of the king. The occasion of this is stated in the statute; that such malevolent designs among the household servants lead to attempts which endanger the king himself; and that a recent fact of that kind had induced the parliament to make this statute.

Some provisions were made for the punishment of inferior offenders. A statute was made for the suppressing of riots, and another for the better execution of former laws on that head¹(a). The first penal law was now made against the canonical offence of usury. Brokers of such bargains were to be set in the pillory, imprisoned half a year, and fined twenty pounds.² Persons lending money, or bargaining for lands or goods, on usury, were to forfeit half the value.³

The execution of penal laws was a subject much attended to by this prince. In order to accomplish this end, the criminal jurisdiction of some ancient courts was extended, and the course of proceeding was greatly facilitated. The most material changes of this sort were made

(a) By 13 Henry IV., c. 7, if any riot, assembly, or rout of people be made against the law, be made in parties, the justices and the sheriff of the county shall come with the power of the county, if need be, to arrest them, and shall have power to record that which they shall find so done in their presence against the law, and by such record the rioters shall be convicted; and if they be departed before the coming of the justices, the justices shall inquire within a month, and shall hear and determine according to the law of the land. Under this act, and also after the above act (19 Hen. VII.), it was held, that when a riot is suppressed by the justices, together with the sheriff, having the *posse comitatus* with them for that purpose, and they commit the rioters by a record of the force upon their proper view, the sheriff ought to be a party to such inquisition, and so he ought by the 19 Henry VII., c. xiii. But if the rioters disperse of themselves, and after they were parted an inquisition is made of it by two justices of the peace, there is no need that it appear by the inquisition that the sheriff was party to the inquiry, because the justices may make inquisitions without him (*Rex v. Ingram*, 1 *Lord Raym. Rep.*, 215). These statutes were practically superseded by the Riot Acts of Edward VI. and Philip and Mary, superseded by the Riot Act, 12 Geo. I., c. xii.

¹ Stat. 11 Hen. VII., c. 7; and stat. 19 Hen. VII., c. 13.

² Stat. 8 Hen. VII., c. 6.

³ Stat. 11 Hen. VII., c. 8.

by stat. 3 Henry VII., c. 1, and stat. 11 Henry VII., c. 3, which, among provisions of real and permanent utility, furnished some innovations that were afterwards disapproved and abrogated.

The first clause of stat. 3 Henry VII., c. 1, made some alteration in the jurisdiction of the council, which had lately been more familiarly called the *Star Chamber*. The remaining part of that statute is taken up with several provisions relating to criminal justice, which we shall defer for the present.

The criminal jurisdiction exercised by the king's council we have had occasion to notice in the early periods of this history; and it has been observed that they sat in this capacity sometimes *en la chambre des estoyers*, which had of late years become their most usual place of sitting; and therefore the council was now most commonly called the *Star Chamber*.¹ There are many instances where this tribunal had exercised its authority in the period immediately preceding the time of which we are now speaking.² This judicature, in its original establishment, was very extensive, and comprehended a great variety of objects within its cognizance. As the constitution of our legal polity became more settled, and the boundaries of justice more exactly defined, this extraordinary authority was in proportion circumscribed. Several statutes had been passed imposing restrictions on the access of complainants to this extraordinary judicature.³ But, notwithstanding this apparent jealousy of the council, the parliament had, at other times, gradually restored to it some of its ancient authority, by referring to that tribunal the cognizance of many enormities which were before inquirable at common law, and which, as such, were not to be examined by the council. Thus, compared with the original powers, the prerogative-judicature of the king in council was much restricted by positive constitutions; and from being, in some degree, above the law, had shrunk into a compass so small, and had withal become so precarious in its foundation, that Henry, who meant to make much use of this court, thought it stood in need of some parliamentary sanction to give it support and authority. These were

¹ *Vide ante, et vide* Lamb., Archeion, 149.

² Lamb., Archeion, 149-154. 4 Inst., 60, 61.

³ *Vide ante.*

the reasons which probably led to enacting stat. 3 Henry VII., c. 1, a statute which did not erect, as some have imagined, but only *new-modelled* the court of Star Chamber. Indeed, the establishment given to this court by the statute of Henry was partial, and confined to certain instances therein enumerated. The design, scope, and extent of this act will be best seen by a rehearsal of it.

The preamble states, that "the king, remembering how by unlawful maintenances, giving of liveries, signs and tokens, and retainers by indentures, promises, oaths, writings, or otherwise, embraceries of his subjects, untrue demeanings of sheriffs in making of panels and other untrue returns, by taking of money by juries, by great riots and unlawful assemblies, the policy and good rule of this realm is almost subdued; and for the not punishing of these inconveniences, and by occasion of the premises, little or nothing may be found by inquiry;" that is, by the ordinary proceeding by an inquest of jurors; "whereby the laws of the land in execution may take little effect, to the increase of murders, robberies, perjuries, and unsureties of all men living," etc., for the reformation of which it was now ordained (a), that the

(a) Lord Bacon makes it one of the chief features of the history of the reign, that the jurisdiction of the council was more asserted and exercised than it had been before; and this belongs to legal history. It was one of the various means used for the support of that arbitrary power which the Tudor dynasty so thoroughly established. The "council" here alluded to was that "court of the Star Chamber," which afterwards acquired so evil a notoriety, and of which Lord Bacon, earlier in his history, speaks thus: "The authority of the Star Chamber, which before subsisted by the ancient common law of the realm, was confirmed in certain cases by act of parliament. This court is one of the safest and noblest institutions of the kingdom. For in the distribution of courts of ordinary fixture, besides the high court of parliament, in which distribution the king's bench holdeth the pleas of the crown, the commonplace pleas court, the exchequer pleas concerning the king's revenue, and the chancery, the pretorian power for mitigating the rigor of the case in case of extremity by the conscience of a good man, there was nevertheless always reserved a high and pre-eminent place to the king's council in cases that might, in example or in consequence, concern the state of the commonwealth, which, if they were criminal, the council used to sit in the chamber called the star chamber; if civil, in the white chamber or white hall. And as the chancery had the pretorian power for equity, so the Star Chamber had the censorious power for offences under the degree of capital. The Court of Star Chamber is compounded of good elements, for it consisteth of four kinds of persons — counsellors, peers, prelates, and chief judges. It discerneth also principally of four kinds of causes — force, fraud, crimes, and inchoate or middle evils towards crimes capital or heinous not actually committed or perpetrated. But that which was principally aimed

chancellor, treasurer, and privy-seal, or two of them, calling to them a bishop and a temporal lord, being of

at by this act was force, and the two chief supports of force, combinations of multitudes and maintenance or headship of great families" (*Hist. Hen. VII.*, p. 35). In other words, this jurisdiction of the council or court of the Star Chamber was the modern instrument used by the Tudor dynasty for the establishment of arbitrary power. It will be observed that Lord Bacon, whose authority as a legal historian cannot be easily set at naught, speaks of it as an ancient and established tribunal. And there is thus much of historical foundation for his opinion, that in the earliest times, beyond all doubt, as has been shown,—long before any superior courts of ordinary jurisdiction existed, and when the only courts of ordinary jurisdiction were the county court and the sheriff's "tourn,"—there was an extraordinary jurisdiction exercised by the king in council, correcting any abuse or supplying any deficiency in the ordinary jurisdiction of the country; and moreover, by degrees, a kind of appellate jurisdiction exercised over the courts of ordinary jurisdiction. And as out of this extraordinary jurisdiction the king's superior courts of ordinary jurisdiction gradually arose, it was assumed that the extraordinary jurisdiction still remained in it as a kind of reserve-force, so to speak, to be appealed to and exercised when necessity arose. And undoubtedly this species of extraordinary jurisdiction had been asserted and exercised by the king in council ever since the reign of Edward I., when the king's superior courts of ordinary jurisdiction had become established, and instances of it in every reign to the present are adduced in the "Treatise of the Court of Star Chamber," which has been referred to with respect by such men as Lord-Keeper Finch and Lord Mansfield (*Harl. MS.*, No. 1226, quoted by Lord Mansfield in the case of the *King v. Wilkes*, 4 *Burrow*, 2554, and printed in *Collectanea Juridica*, vol. 2, p. 1). This treatise is an elaborate vindication of the authority of the court in accordance with Lord Bacon's account of it already quoted. He cites in confirmation of the view various statutes, as 27 Richard II., c. vi., and 13 Henry IV., c. vii., which speak of and apparently recognize this jurisdiction of the king's council, and it maintains that the statute referred to by Lord Bacon, 3 Henry VII., c. i., did not establish the court, nor define or restrict its jurisdiction. And he even controverts Lord Bacon's view that the statute confirmed the jurisdiction of the court. The statute mentions seven heads of jurisdiction—maintenance, giving of liveries, having retainers, embracery, jurors receiving money, untrue demeanor of sheriffs in false returns of panels, routs, and riots (3 *Hen. VII.*, c. vii.). But the treatise maintains that it had unlimited jurisdiction in all cases which the council considered to concern the state, and was not bound by ordinary law; in other words, that its jurisdiction was utterly arbitrary. And it certainly shows that this jurisdiction was asserted and exercised all through the reigns of the Tudors, in civil cases between party and party, and in criminal cases not capital, especially offences against the public justice or the public peace. In the "Treatise on the Star Chamber," under the head of the jurisdiction of the court, it is strenuously maintained that the jurisdiction was not restricted to the matters mentioned in the statute, in which it is observed "all the principal offences examined in the court are not touched, as forgery, perjury, fraud, contempts, and many others." Here again, however, it may be observed that the jurisdiction was no doubt adapted to the exigencies of the times, and that the statute would be naturally directed rather to these matters, which then were most important, and hence, as Lord Bacon says, it was pointed chiefly at force. But as the times became more peaceable, these kinds of offences were more taken cognizance of, as found to be more prevalent. It is to

the council, and the two chief-justices, or, in their absence, two other justices, upon bill or information put to

be observed, that it is stated in the treatise that the court had taken cognizance of civil causes. And King Henry VII. heard a case between one Houghton, a saddler of London, and Barker, a goldsmith, and decreed to the plaintiff two hundred marks and £40, according to the intention of a will of one Houghton deceased. But the most common examination of titles and interests was when any differences arose between corporations, and abbots, and convents, and mayors, and commonalties, of which says the author, "I could show above a hundred in the reigns of Henry VII. and Henry VIII., or between great and mighty men, whose interest drew malice and partaking (*i. e.*, partaking of their quarrels), which was dangerous to the peace." In this view the jurisdiction of the court was in advancement of the object of the statute of livery and retainers, that act putting down the combinations for the maintenance of great men in their contentions; and this court on the one hand enforcing that act, and on the other hand settling the quarrels. Thus, here again we see the tendency of the age to educe the kind of institutions which were suited to its exigencies. The author goes on to say: "Thus stood the power of the court in ancient times," *i. e.*, in those times when we find civil causes determined on appeal by the king in his council; "but in later times, when tyranny and malice more aboundeth than ever it did heretofore, the court doth principally exercise itself in criminal cases." The author lays it down that all offences might be examined and punished in this court at the king's pleasure; only, he adds, be it observed, that as to cases of crimes punishable in the courts of common law, if taken cognizance of here, it were either at the king's instance for the mitigation of the penalty, or, on the other hand, where the offender was so high in station that he could not be reached by a humble prosecutor. Thus he says one Alice Fordman prosecuted Sir John Hussey, a privy counsellor, in 7 Henry VIII., for being accessory to the murder of her husband; and in 16 Henry VIII., Lord Dacres was committed by this court for giving entertainment to a notorious felon, and so was the Lord Ogle for the like offence. But corruption of officers, or neglect of justices of the peace in their duties, or not bringing felons and offenders to justice, or not granting articles of the peace, have always been examined here. And in 1 Henry VIII., in Sir Robert Plinton's case, because riot was mixed with murder and felony, it was long debated whether the court should proceed; but it was resolved to proceed for the riot (sect. 5). He speaks in another section of force: "which includes, he says, riots, routs, unlawful assemblies, forcible entry," etc. As to riots, etc., more than one statute of this reign empowered justices of the peace to make inquiry and presentment; and if they did not do so, they were themselves liable to be presented to the council. Another great head of the jurisdiction, according to the author of the treatise, was that of perjury, especially against jurors in criminal cases in which no attain would lie. In the reigns of Henry VII. and VIII., he says, there was scarce a term but some grand inquest or jury was fined, in acquitting felons or murderers. It is observable, however, that almost all the cases cited are of the reign of Henry VIII., or of some subsequent reign; and there is reason to believe that the jurisdiction of the court in this reign was confined to the cases mentioned in the statute, and chiefly, as Lord Bacon says, to cases of force, and that it was afterwards extended to other classes of cases. That the court took cognizance of cases of forgery and perjury was probably owing to the want of any adequate penalty at common law; and the author of the treatise mentions one case in the reign of a prosecution in the Star Chamber for forgery of deeds. Most of the heads of jurisdiction were afterwards super-

the chancellor for the king, or any other, against any person for any misbehavior above-mentioned, *have au-*

seded by statutes passed in the ensuing reign, making such offences more severely punishable in the courts of common law, and the jurisdiction was then by degrees extended to cases of libel, sedition, and other offences of a political character, under color of which it was exercised so arbitrarily under that dynasty. There are not wanting traces of the rise of the arbitrary exercise of the jurisdiction of the court, even in the present reign. Thus in the "Treatise on the Star Chamber" it is stated that in the 11 Henry VII., one Bengley, a burgess of parliament, made his appearance in the court, and was enjoined to appear *de die in diem*. It is stated also that churchmen were not free from the sentence of the court, and that men of no degree or estate were privileged from its jurisdiction. It is stated that in Henry VII.'s time a privy-seal was served upon the Earl of Kent to appear in this court. In the 17 Henry VII. the vicar of St. Dunstan-in-the-West was summoned to appear in this court. In the 10 Henry VII. there was a cause by Sir James Danby against the city of York. In the 11 Henry VII., one Crowner was enjoined to bring in one Sharp's daughter, whom he had unduly withdrawn from her father, and to deliver her in court as contracted. And it appears that in this reign the court would always stay proceedings in any other courts until this court had determined the matter. "The statute-book" (says Sir J. Mackintosh) "attests the universal distemper of the community during the civil wars, and bears frequent marks of the injurious arm of a sincere reformer, employed in extirpating the evils of a long license. Of these not the least remarkable is the act for the authority of the Star Chamber, of which the first object seems to have been the suppression of the unlawful combinations which endanger the public quiet or disturb the ordinary dispensation of the law. No words in the statute expressly comprehend libels or other political misdemeanors, in which the court of Star Chamber became decidedly odious. . . . The early history of these councils is obscure; but they appear to have derived jurisdiction sometimes from acts of parliament, and oftener, perhaps, to have assumed it by an usurpation, which usage in due time legitimated. The court established by the statute was composed of the chancellor, the treasurer, the privy-seal — calling to themselves a bishop, and a temporal lord of the king's council, and the two chief justices. And they appear early to have appropriated to themselves many fragments of the authority anciently exercised by the council, as well as to have stretched their jurisdiction beyond the boundaries prescribed by the statute. A tribunal composed of five of the king's servants, removable by him at pleasure, invested with a right of selecting two other members, on whose subserviency they could best rely, would have had resistless temptations to incessant encroachment on the rights of the subject; and even if the judges had not been so powerful as to defy all ordinary consequences, and if the very letter of the law had not quickened their passion for discretionary powers by alleging the disturbance and failure of justice in its ordinary course through juries as the reason for the establishment of the new tribunal, their jurisdiction over juries indeed in effect subjected the laws to their will. When they animadverted on a verdict, they had an opportunity of retrying the cause in which it was given, and thus of taking cognizance of almost all misdemeanors, especially those of a political nature, which they might plausibly represent as offering most obstacles to the course and order of the common law. From these and other like causes sprang that rapid growth of the arbitrary power of the court, which, if the constitution had not overthrown, must have worked the downfall of the constitution" (*Mack. Hist. Eng.*, vol. ii.). Thus all through this and the next reign the arbitrary jurisdiction went

thority to call before them by writ or privy-seal the offenders and others, as it shall seem fit, by whom the truth may be known; and to examine and punish after the form and effect of statutes thereof made, in like manner as they ought to be punished if they were convicted after the due order of the law.

This is the substance, and nearly the very words, of the statute, which plainly point out the occasion of this new regulation, the objects of cognizance, the judges, the process and proceedings, with the power of punishing; from which it is manifest that the king's council derived from this statute an enlargement of its judicial authority. There is nothing prohibitory of the former jurisdiction or mode of proceeding here; but that is, on the contrary, recognized, as it were, and affirmed by the very cautious manner in which the enacting part of this statute is worded; for, instead of saying that those great officers *shall* have authority, it barely declares that they *have* authority; thereby plainly intimating an apprehension of a pre-existent authority, and only declaring more particularly the exercise of it in some certain cases.

It should seem, that whereas, before this statute, the king and council did not admit any complaint but such only as carried with it, according to Lambard's expression, a reasonable surmise of maintenance of their jurisdiction,¹ for proof also of which the complainant ought by stat. 15 Henry VI., c. 4, to give sureties; now, by this act, besides that ancient authority, three only of the council,

on growing and increasing, although there were many cases in which it was beneficially exercised before the jurisdiction of the court of king's bench was thoroughly established. Thus, in the first year of Elizabeth, one Brouker, sheriff of Wiltshire, was sued by information in the Star Chamber, at the suit of the queen, for a false return of a knight of parliament for the county, when in fact one Penruddock was chosen by the greater number of freeholders in the said county, in deceit of the county, and of the whole realm. And it appeared by examination that Brouker was not sworn to execute his office. And this matter, upon grave resolution, and in an honorable and very large assembly of the nobles, was decreed against Brouker — that is to say, that for contempt of the ancient law that every sheriff should be sworn, he should pay his fine to the king, £100, besides being imprisoned for five weeks; and also £100 was adjudged to the queen, according to the statute 8 Henry VI., c. vii., for the false return, and also an imprisonment for a year (*Brouker's Case*, *Dyer*, 268). In modern times such cases would be dealt with by criminal information in the court of king's bench; but that high court had not then developed the full extent of its lofty jurisdiction.

¹ Lamb., *Archeion*, 167.

namely, the chancellor, treasurer, and privy-seal (taking to their assistance others thereby appointed), were enabled to hear and determine ordinarily of those eight offences above mentioned, and that without any manner of such suggestion or surmise at all.

Some defects of this statute were supplied by stat. 21 Henry VIII., c. 20, by which the president of the council is added to the former three principal persons. A doubt which arose upon this act, soon after the passing it,¹ whether the bishop, lord of the council, and justices, were only assistants, or had equal authority with the three great officers, was removed by this later act, which declares that they were only there for their advice. Lastly, the bill or information, which by the former act was to be exhibited to the chancellor, was by the latter to be put in generally; that is, to the king, as formerly.

Thus by the operation of these two statutes, the above-mentioned eight offences, which before were mostly cognizable by indictment or action, might now be arraigned and tried without any inquest or jury, on the bare examination either of witnesses or of the parties themselves. This innovation was devised, says the statute, because the ordinary proceeding at common law was found unable to reach such offenders. However, the punishment to be inflicted was such as would have followed had the prosecution been at common law.

The alteration made as to these offences by this act consists principally in the circumstances of process, judges, and trial, the nature of the crime and its punishment remaining as it was before. If, therefore, the council departed from the measure of the penalty, or in any consideration of the crime varied from the judgment of the common law, it must be understood that they then acted under the former authority which they originally possessed as the council of the king, and not by virtue of these statutes. For that authority still remained; and the council, in the understanding of the law, and in the execution and practice of their authority, sat and acted in both capacities, as appears by the books of entries during the reigns of Henry VII. and Henry VIII., which two princes did often sit there in person, under each jurisdiction.²

¹ 8 Hen. VII., 13.

² Lamb., *Archeion*, 168, 171, 172, 173.

It is to this mixture of judicial power that the Star Chamber was indebted for the tremendous authority which it began to exercise soon after this time. While the statute of Henry VII. gave vigor and efficacy to its proceedings, the immeasurable extent of its ancient judicature furnished an inexhaustible source of crimes and punishments, to be called forth on all occasions, and for every purpose. It became, on that account, the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign; as may be seen in the history of the princes of the house of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal. The Star Chamber exercised a criminal jurisdiction almost without limitation, and altogether without appeal; taking upon it to judge and animadvert upon everything in which the government felt itself interested. It became, in truth, as much a court of state, if the expression may be allowed, as a court of law, by punishing all obnoxious persons, who, though they had been guilty of no breach of the law, had, nevertheless, some way or other offended the prince or his ministers. As the members of this tribunal were the confidential officers of the crown, there was no difficulty in those times of procuring a sentence against offenders of that description. The penalties inflicted by this court were so extravagantly severe, and the very design of its judicature so repugnant to the spirit of a free constitution, that it was always viewed with the greatest abhorrence by the subject, and at length, when political liberty began to vindicate its claims with more boldness, was totally abolished by parliament.¹

Another innovation upon the common law, and of a much more general nature than the former, was effected by statute 11 Henry VII., c. 3. Informations at the assizes and sessions. The commencing of prosecutions by information had grown into common use in the reigns of Henry VI. and Edward IV., and were generally confined to penal statutes, and likewise to the court of exchequer and king's bench. But the above-mentioned statute permitted justices of assize and of the peace, upon information, to hear and determine, without a jury, all offences (except treason,

¹ By stat. 16 Car. 1.

murder, or felony) committed against any statute not repealed (*a*). This act was probably dictated by that prevailing inclination of Henry and his ministers to enforce the observance of old penal statutes, or rather to compel payment of such penalties as were incurred by a breach of them. This scheme of filling his exchequer was unpopular, and therefore not fit to be trusted, in any part of it, to the verdict of common jurors. Whether this, or a general jealousy of the trial by jury, was the reason of the law, it was a regulation not to be endured, and was repealed in the beginning of the next reign.¹

It was by color of this act that Empson and Dudley were enabled to effect such infinite oppressions and exactions upon the people. For this purpose, too, a new office was erected, and those two persons were made *masters of the king's forfeitures*. The reason of repealing this act is stated to be, "for that by force thereof it was known many sinister, crafty, feigned, and forged informations had been

(*a*) This statute, it will be seen, was repealed in the next reign; but it proved the original of a great number of statutes passed in and after that reign, giving justices, even in petty sessions, power to determine matters summarily, and inflict fines or imprisonment. And at common law, or by the old law as to justices of the peace (*vide ante*, vol. iii., c. xiv.), there was power to call upon parties to enter into recognizances, as to keep the peace, or otherwise; and upon forfeiture, which might be at petty sessions, the recognizances were escheated into the exchequer, prior to a modern act—the 3 Geo. IV., c. xlvi. The spirit in which information in that age were decided may be shown by an instance taken from this reign. An information was filed in the exchequer for giving of liveries, and the informer did not declare upon which of the statutes of liveries the information was brought, and the objection was taken, but disallowed; for *it shall be taken as it is best for the king*—i. e., *that which gives the greater penalty* (*Year-Book*, 5 Hen. VII., fol. 17). This may serve to show the spirit in which the king's authority was supported in his courts. It was held, in this reign, that in a suit on a penal statute which gave part to the king—although the plaintiff sued both for the king and for himself—yet the king was not party to the action; for if the plaintiff were nonsuited, or released the action, it was ended as against the king; and although the king was to have half the sum recovered, that did not make him a party to the action; so that the king had no control over it (20 Hen. VII., fol. 7). Hence the necessity for the statute as to collusive and convinous compromises, or releases of penal actions, which the author has omitted to notice—actions, it is to be observed, when the suit of the party, and even when *quittam*, and therefore could be settled by the parties to the prejudice of the king, whose great object was to enrich himself by penalties. Suits by way of information were the *king's suits*, and the whole benefit would accrue to himself; but informations in the exchequer had always been tried with juries.

¹ By stat. 1 Hen. VIII., c. 6, c. 10.

pursued against many of the king's subjects, to their great damage and vexation."

Such were the innovations made in the judicature of our criminal courts: we are now to notice what alterations were made in the course of proceeding and prosecution, which brings us back to the famous stat. 3 Henry VII., c. 1. We have seen, in the last period, some parliamentary regulations regarding jurors, dictated by a suspicion that they did not discharge their trust with impartiality and truth¹ (a).

Among Henry's schemes for a due execution of the law, one was to oblige inquests to be very strict and regular, in making their presentments. In the clause of stat. 3 Henry VII., c. 1, next after that for the institution of the new form of the Star Chamber, it is ordained that justices of the peace "may take by their discretions an inquest to inquire of the concealments of other inquests;" and every person of such inquest was to be punished for the concealment by the discretion of the justices (b). This was a refinement upon the proceeding by inquest in criminal matters, and was in the nature of an attaint in civil causes.

An appeal of homicide still continued a common mode of prosecution, notwithstanding the frequency of indictments; and the genius of the times so disposed persons to favor this vindictive action (c), that no

Appeal of murder.

(a) A statute of this reign recognized the common-law rule that jurors should be freeholders whose estates were at least worth 40s. a year, probably borrowed from the stat. of Henry VI. as to qualifications of parliamentary electors for counties. In the next reign there was a more important act as to jurors. As is already shown in the introductory note, it was part of the policy of the reign to enforce an effective execution of penal laws by local magistrates.

(b) It was held in the king's bench that an indictment for felonious rape presented at the leet on the sheriff's tourn was void, for that it was felony by statute, and there was no power to inquire at the leet of other things than those which there was power to inquire of at the commencement, when the leet was first granted, although it had now continued from time whereof memory did not run to the contrary. The leet, it was said, could only have jurisdiction to inquire of things of which it had jurisdiction at common law and not of an offence created by statute, but the justices could inquire of it because of the express words of their commission (*Year-Book*, 11 Hen. VII., fol. 22). It has been seen that in the reign of Edward IV., the jurisdiction of the sheriff to try criminal cases in his tourn was taken away; and it was enacted that he should send the presentments to the session. These measures were steps in the progress of the great revolution by which all civil and criminal jurisdiction was vested in the crown.

(c) Our author seems to have thought ill of the procedure by appeal,

¹ *Vide* vol. iii., 183, 184.

indictment of murder used to be tried till the year and day after the fact (the period limited by law for commencing an appeal), lest the offender, being acquitted or convicted on the indictment, might plead such acquittal or conviction in bar of the appeal. After this space of time had elapsed, it often happened, either by the death of witnesses, or the zeal for justice subsiding, that prosecutions were entirely dropped, and the delinquent escaped unpunished. Again, an appellor must sue in person; and the suit being long and expensive, he frequently became tired of the prosecution, so that with all these impediments, justice was not regularly enforced against this kind of offenders. To remedy this in future, the following regulations were made by this act. It was enacted, that if any principal

which was at the suit of the party. In the reign of William III., Holt, chief-justice, said that "he wondered that it should be said that an appeal was an odious prosecution." He said he esteemed it a noble remedy, and a badge of the rights and liberties of an Englishman. The statute of Gloucester, 6 Edward I., c. ix., had provided, he said, that it should not be abated so lightly as it had been, but should be maintained. And the 3 Henry VII., c. i., gave power to proceed at the suit of the king within the year, yet saved the appeal to the party after acquittal. And, therefore, since the remedy had been favored by acts of parliament, and tended to the support of families, and was of evident necessity in some cases, the court ought to encourage appeals. These remarks were made in one of the last cases of appeal—the appeal brought by the relations of a woman said to have been murdered by Spencer Cowper, who had been acquitted on the trial of an indictment. The appeal was in the name of an infant, from whom the under-sheriff, at the instance of Cowper's friends, took the writ of appeal. He was punished for contempt, but it was held that the infant could not have another writ. No reasons appear for this astonishing decision, which was given in the face of the fact that the writ had been got rid of by the friends of the defendant. This was the way in which the courts encouraged appeals (*Rex v. Toler*, 1 L. R., 55). The last case of appeal was in our own time. The appellee claimed to do trial by battel, which, being allowed, the appellor gave it up (*Ashford v. Thornton*, 2 B. & Ald.). An appeal, he it observed, could only be brought in case of murder, by the wife or issue (*Dyer*, 46–69). In cases of robbery, an appeal would lie, and was commonly brought for the sake of restitution, the proceeding being deemed in the nature of an action; and the party had restitution because the property was not divested out of him by the felony, and the action was for his own advantage (*Ibid.*). In cases of appeal of murder, the defendant might have trial by battle (*Dyer*, 120); and if he were discharged thereon by demurrer, he might yet be arraigned at the suit of the king (*Ibid.*); that is, provided the appeal was brought first, as it always was at common law, being the remedy of the party, for which reason the law gave him the option of prosecuting. This was altered by this statute, and the indictment could then be brought at first; and if the defendant was acquitted thereon, he was still liable to be apprehended (*Dyer*, 133). By 2 and 3 Edward VI., c. xxiv., appeals for murder were to be brought in the county where the party died, as well against the principal as the accessory.

or accessory in murder be indicted, he may be arraigned and tried at the king's suit at any time within the year, and not tarry the year and day for the appeal; and should he be acquitted, the justices are not to discharge him, but either remand him to prison or let him to bail till the year and day is past; within which time the person so acquitted, or even if he should be attainted (and not have the benefit of his clergy), (*a*) the person so attainted may yet be appealed by the wife or next heir before the sheriff and coroners, or in the king's bench, or at the gaol-delivery. To facilitate likewise the prosecution of such appeal, it was allowed, that where battail did¹ not lie, the appellor might sue by attorney.

The power of trying an offender a second time for the same offence is confined to cases where the party had not had his clergy, because a clerk so delivered to the ordinary was to be subjected to canonical punishment, and was no longer within the jurisdiction of the temporal judge. This provision, though reasonable when first made, has occasioned, by the alteration that has since taken place in the disposal of clerks, a very singular distinction; for it now happens, that though a man acquitted of an indictment for murder may afterwards be appealed, yet a person who is found guilty of what is at present considered as a less offence, under the name of manslaughter, is not liable to be appealed under this statute (*b*), because his clergy has been allowed.

(*a*) As to benefit of clergy, see the next section. Because, according to the ancient principle, it would not be just that a party should be twice punished for the same offence.

(*b*) It would have been very singular if he had been, seeing that he had already been convicted, and (it was to be presumed) punished; and it would be contrary to principle that a man should be twice punished for the same offence. This was the reason assigned in ancient times for the immunity claimed by the clergy, after canonical trial. No doubt it was also assumed that they ought to be canonically tried; and that rule, as the author observes truly enough, "was reasonable when first made," that is, because the mode of trial in ancient times, the brutal battel, or the absurd ordeal, was abhorrent to common sense; and so long as the laity resisted the efforts of the clergy to establish a more rational system of trial, it was only reasonable that the clergy should insist upon exemption from brutal and barbarous usage, which did not deserve the name of trial. But now that the persuasions of the clergy (as Lord Hale expresses it in his history) had long ago abolished the ordeal, and had virtually got rid of the trial by battel, by the institution of a rational mode of trial on the *evidence*, there was no longer the same cause for the exemption; and accordingly (as will be found stated in the

¹ *Vide* vol. iii.

The other parts of this act either enforce the observance of certain common-law proceedings in case of murder, or direct some new methods to be followed on the like occasion.

It was declared, in the spirit of our old law¹ (*a*), that should any one be murdered in the day-time, and the murderer escape (*b*), the township should be amerced; and that as well the coroner should inquire thereof upon view of

next section) it began to be attacked, and was, by degrees, destroyed. But so long as it existed, it is obvious that it rested upon, and assumed that the cleric was only liable to canonical trial; and that being so, after undergoing that, that he could not be tried again, simply because, by the canonical law, he was not liable to another trial. The common law allowed the party, in case of robbery, or the nearest relative in case of murder, to bring an appeal—which was a kind of civil prosecution or criminal action; but that was peculiar to the common law; and if the party to be tried was not liable to the common-law trial at all, he could not be tried twice; though, if the criminal had not had the benefit of clergy, and was liable to common-law trial, he might be tried twice. There was an error, therefore, in supposing there was any inconsistency.

(*a*) The statute of Winton, under which the hundredors were liable for robberies in the day-time on the highway, and on which principle, upheld by the 27 Eliz., the hundred was afterwards, by the act of George I., made liable for damage done by rioters.

(*b*) That is, it being a secret homicide; for if it were openly done, as the perpetrator would be seen and known, it would not be likely that he would escape. And if the homicide were secret, it would be presumable that it was premeditated or designed; and hence the idea of murder as done with “malice prepense.” It is only in this indirect mode that the idea appears to have been arrived at; for our ancestors had not made any distinction between one kind of intentional homicide and another, and deemed all homicide intended at the time of the act done to be equally felonious and capital, whether or not it were done with previous design or premeditation; and hence it would be equally so if done in passion, or under provocation (unless in self-defence); and so that any act of homicide, intended to be an act of homicide, whether not previously designed, was felonious; and there was no distinction between one kind of felonious homicide and another, except such as was created indirectly by statutable enactments, such as the present. Another class of statutable enactments, which drew the distinction between murder and other felonious homicide, were those which took away the benefit of clergy; enactments which also, as noticed elsewhere in this chapter, commenced in this reign. These enactments drew the distinction for the practical purpose of distinguishing which kind of homicide should be capital; for the practical effect of taking away the benefit of clergy from felony was to leave it capital, as at common law all felonies were. The distinction then was drawn, which has ever since prevailed in our law, between felonious homicide, *i. e.*, intended, but not designed (or in passion)—and murderous homicide, or homicide not only intended, but designed—that is, *previously* designed or premeditated, so that it could be said to be done with “malice prepense.” Such homicide was termed murder; and hence the origin of the modern distinction between murder and manslaughter, or felonious homicide.

¹ *Vide* vol. ii.

the body, as justices of the peace, who were to certify it into the king's bench. Coroners were to deliver their inquisitions before the justices of the next gaol-delivery within the county; and if the murderer was in gaol, they were to proceed to the trial of him, or put the said inquisitions to the king's bench. For this trouble the coroner was to have a fee of thirteen shillings and fourpence for the inquisition, to be paid by the township if the murderer had no goods: a penalty was inflicted for neglect of duty. As a part of the same scheme for preventing public disorders, and for keeping the police under good government, it was directed, that justices of the peace should certify at the next sessions all recognizances of the peace, that the party bound might be called; and if he did not appear, the recognizance, with the record of default, was to be certified into the chancery, king's bench, or exchequer.

The authority of justices of the peace was further strengthened by c. 3 of the same statute. By Bailing felons by justices of the peace. stat. 1 Richard III.,¹ every justice of the peace was permitted to bail persons arrested for light suspicion of felony; but this authority, as it was given to every single justice, had been abused, and many heinous offenders, not mainpernable by law, had been let out upon the country; so that this statute, which was designed only to alleviate the condition of felons before trial, had contributed to obstruct the execution of justice. To obviate this, that statute was now repealed; and it was further ordained, generally, that the justices of peace in every county, city, or town, *or two of them at least*, shall have authority to let to bail persons mainpernable by law (a) to

(a) The law upon this important subject has been based, as Lord Coke showed, upon the enactment in the statute of Westminster (13 *Edw. I.*, c. xv.), which ascertained what offenders were bailable, and laid down that murderers and *manifest* offenders were not to be bailed, but only the lesser offenders, arrested upon suspicion only. The cardinal principle was here laid down, which was pursued and carried out in all subsequent enactments and judicial decisions. In the reign of Philip and Mary another statute was passed, by which it was declared that no one arrested for manslaughter or felony should be let to bail but by justices in sessions, or by two at the least; the object being evidently to secure a judicial consideration of the subject. There were, it is to be observed, at this time two modes in which a person might be committed for felony, — on the inquisition of a coroner's jury in cases of murder, or by committal of a justice in every case of felony. In the modern practice,

¹ *Vide ante.*

the next general sessions, or gaol-delivery; and one of them at least was to certify the same to the sessions or gaol-delivery, under the penalty of £10. Sheriffs and keepers of gaols were to certify the names of their prisoners at the next gaol-delivery, to be calendared before the justices of the deliverance of the gaol, under the penalty of £5. In this manner was the article of bailing felons, and the delivery of gaols, begun to be put in the course it has continued in ever since. The sure custody of prisoners was provided for by a statute, which declared all county gaols to be in the keeping of the sheriff, and ordained several penalties upon him and his officers if they suffered felons to escape.¹

In the next year a provision was made which it was thought would contribute to a due discharge of the important trust reposed in these magistrates. By stat. 4 Henry VII., c. 12, a proclamation, therein set forth, is directed to be read at the sessions four times a year. This exhorted persons who had cause of complaint against any justice to state their grievance to any of his fellow-justices in the neighborhood; and if he gave them no redress, then to the justices of assize; and should they still think themselves not redressed properly, to the king, or his chancellor.

the Court of King's Bench, or a judge, can allow bail in cases of commitment on coroner's inquisition; but will not do so after a bill found. These two kinds of cases are deemed to rest on very different grounds. The court, in the former case, can have before it the depositions on which the charge is founded, and can consequently see what are the grounds upon which the conclusion of the grand-jury has been arrived at, and form a judgment as to its correctness. But where, on the other hand, a true bill has been found by a grand-jury, it is not so, for they cannot divine or discover upon what evidence the jury acted. This distinction is well laid in *Lord Mohun's case* (1 *Salk.*, 104), where it is said, "If a man be found guilty of a murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing, which we may look into; otherwise, if a man be found guilty of murder by a grand-jury, because the court cannot take notice of their evidence, which they are bound by their oath to conceal." In *Bac. Abr.*, tit. "Bail in Criminal Cases," are these words:—"Nor will they bail after a bill for murder found, though the fact were plainly manslaughter." And in the case of *Kirk and Case*, for the murder of Seymour Conway (*Michaelmas Term*, 12 *Will. III.*), the court held they would not bail after murder found, though, in fact, it plainly amounted to manslaughter only. There are also the cases of *Reg. v. Chapman* (8 *Car. and P.*, 558), and *Reg. v. Guttridge* (9 *Car. and P.*, 228), in both of which the application to admit to bail was refused after a true bill had been presented by the grand-jury.

¹ Stat. 19 Hen. VII., c. 10.

The benefit of clergy, that impolitic exemption, began now to be modelled by the legislature almost into a new form, and applied to the purpose of penal restriction with reason and effect (a). It became a

(a) It has already been observed, that with respect to the mode of trial there was no longer the same reason for the exemption of the clergy from the jurisdiction of the ordinary tribunals; and though there was still some reason for it as to the punishment of certain offences, where the punishment was capital, that exemption began to be regarded by the laity with jealousy and impatience. Moreover, by a curious change in the circumstances of the times, the privilege now had become applicable to laics as well as clerics. That had arisen in this way: that the reason or cause of the privilege having been originally the respect and reverence paid to the clergy, partly on account of their superior learning, or rather from their being the only class in the country who had even the rudiments of knowledge, it had become a test of title to the privilege that the party claiming it should be able to read. This, when the privilege was originally established, would have been a pretty safe test, for no one in ancient times could read or write except the clergy, and even kings and nobles executed deeds and charters by their marks, because they could not write. But times had changed; and that which had once been a test of title to the privilege was so no longer, for numbers now could read who were not clergymen, and yet by the common-law rule, which general custom had established, they were entitled to the benefit of clergy. The course of practice (as will be seen by reference to the Year-Books or the cases in Keilway's Reports) was for the court to refer the pursuer to the ordinary, who certified whether he could read; and if he could, he had the privilege. There are curious cases on the subject, which, however, it is hardly worth while to quote, because a far more important reflection suggests itself, and that is this; how inevitable is the tendency of time, by reason of change of circumstances, to cause changes in the laws; because by reason of such change of circumstances, they become unsuitable to the age. And this inevitable influence of time and change had begun to work its effects even upon the laws connected with the church. And this feeling against privilege of clergy, and the similar privilege of sanctuary, is among the earliest indications of the rising disposition of the laity to assert their equality with the clergy; whence arose the movement which, in the next reign, resulted in a religious revolution—the substitution of the royal supremacy, representing the lay power, over the papal supremacy, which represented the ecclesiastical power. That this movement had its origin in that feeling on the part of the laity, and that disposition to assert their equality with the clergy, is shown by this very fact that the earliest indications of the movement were the attacks upon their ancient clerical privileges and immunities. They were not less clerical in their character, because by reason of change of circumstances they were now claimable by numbers of persons who were not clerics, while, on the other hand, that made more manifest the unreasonableness of the privileges, and their unsuitableness to the altered circumstances of the times. In the courts of law, all through this reign, these privileges were spoken of with sarcasm and treated with disrespect; and in the statutes here mentioned it will be seen the first attempts were made to restrain, and by degrees to destroy, them. Those attempts, it will be found, were continued in the next reign and ensuing reigns, and even before the separation from Rome these privileges were greatly limited, and the way prepared for their entire abolition. In the present reign it will be observed that the legislation against the privilege of clergy was confined to cases of *laics* claiming the benefit of it.

distinction between offences, and not between persons; and being taken away from offenders in some crimes, or some circumstances of crimes, and not in others, it served to proportion the degree of punishment according to the true measure of distributive justice, the heinousness of the offence.

This privilege being designed at first only for the actual clergy, was, it has been seen, by degrees extended to all who could read, and so were *capable of becoming clerks*. Though the stat. *de clero*, 25 Edward III., by specifying the orders of clerks that should be entitled to this privilege, excluded actual laymen from claiming clergy, yet the former latitude soon prevailed again, and a capacity to read became once more synonymous with clergy:¹ it had also been the usage to allow it to all such felons in every single offence. This deviation from the original idea, which permitted every one who could read to commit any felony with impunity, though an enormous abuse, did not so shock the understandings of men bigoted to an ecclesiastical tyranny, as to excite at once an entire reform. The legislature proceeded gradually and with reverence for the ancient privilege they were about to invade; and attacking first those who had least claim to indulgence, they sacrificed all lay offenders to the demands of justice. By stat. 4 Henry VII., c. 13, laymen are allowed their clergy only once; and (probably to prevent their imposing on the court at a second trial, and praying their clergy again) it is ordained that every person so convicted shall, if it is for murder, be marked with an M upon the brawn of the left thumb, and if for any other felony with a T; which marks are to be made by the gaoler in open court in presence of the judge, before the party is delivered to the ordinary. Those who are actual clerks are, upon a second trial, if they have not ready their letters of orders, nor a certificate thereof from the ordinary, to have a day appointed by the justices to bring them in; and if they fail at the day, they are to lose the benefit of their clergy, like those who are not in orders.

Thus was the ancient claim of clergy taken away from certain persons, who were considered as not answering the description of clerks properly entitled to that privi-

¹ *Vide* vol. iii.

lege. This was followed about three years after by another statute, which related not to particular persons, but to particular offenders, who were thereby deprived of this benefit. The stat. 7 Henry VII., c. 1, having provided several penalties in cases of desertion from the army, enacts, that soldiers departing out of the king's service without the license of their captain, shall be deemed felons; and "forasmuch (says the statute) as this offence stretcheth to the hurt and jeopardy of the king our sovereign lord, the nobles of the realm, and of all the common-weal thereof," a person so offending shall not enjoy the benefit of his clergy. Such prevalent reasons did the parliament think it necessary to state for curtailing this privilege, which had been enjoyed by felons for several centuries.

Some few years after, an accident happened, which brought the subject of clergy again under consideration of the legislature. One James Grame had murdered his master, and a special act of parliament was made for the punishment of this heinous offence, which otherwise would have escaped under the exemption of clergy. It was therefore enacted by stat. 12 Henry VII., c. 7, that this person should be attainted of the murder, as a felon, in petit-treason; and should be drawn and hanged, as persons who are no clerks, notwithstanding any privilege of clergy. It was also further ordained, that for the future, if any lay person prepensedly murder his lord, master, or sovereign immediate, he shall not be admitted to his clergy (a).

(a) This was the first of a large series of statutive enactments which, by taking away the benefit of clergy in certain cases of felony, virtually rendered such offences capital. So long as privilege of clergy existed (and it continued to exist for a long period after the present reign), it was in effect an exemption from capital punishment, and it was in that aspect, probably, it was now most considered; for, as already has been mentioned, the other reason which originally existed for it — the barbarity and absurdity of the mode of trial — could no longer be appealed to, since cases were tried upon evidence or knowledge, though still the procedure was far from being satisfactory, and there was little resemblance to what could now be called a trial upon evidence. The old barbarity, however, still to a great extent continued in the punishment of criminals; and the general rule was, that all felonies were capital. The church regarded with horror the infliction of death for such offences as robbery, or even larceny, and had so far indeed influenced the common law, as to introduce from the canon law the merciful distinction between "mortal" or "grievous" theft — that is, theft to a serious and theft to a trifling amount; and the common law had founded upon it the humane distinction between grand and petit larceny, the result of which was that a

Thus far, and no farther, did the legislature venture to go, in taking away the privilege of clergy, during this reign. They confined themselves to an instance where the safety of the kingdom was immediately interested, and to a crime which stood in the highest order of private offences, namely, petit-treason. When this way of heightening the severity of our penal law was once pointed out, it will be seen in the next and succeeding reigns with what quick steps we have hastened to increase the number of those cases in which the blood of our fellow-citizens may be shed by law (*a*.)

It will be proper in this place to observe, that we find in this reign a singular instance of the legislature interposing

thief would not be executed unless he had stolen to the amount of twelve pence, a sum equal, probably, to not less than from £5 to £10 in our present currency. Still, the general rule was that felonies were capital, and that even thieves were executed. The church revolted from the cruelty of exacting the penalty of death for such offences as theft, and the practical effect of benefit of clergy was to relieve criminals from this awful penalty and substitute the more merciful sentence of restitution. This, it is manifest, was the aspect of the privilege which was most calculated to commend it to the minds and reason of men, and probably but for this aspect of it the privilege would have been soon entirely abolished, whereas it endured for many generations a perpetual protest on the part of the church against a bloody and barbarous criminal code. There can be no doubt that in this respect the church was beyond the age, as in other respects it was behind the age; and it is worthy of observation that, in that respect in which it was before the age, because its views were based upon the eternal principles of humanity and reason, its views have triumphed, and after the lapse of three centuries, our criminal law has actually in this respect been brought into accordance with the view represented by "privilege of clergy," except in the case of murder, for that is the only ordinary crime (treason being an extraordinary exception) which is now capital by our law. The practical result of the enactment above mentioned was, that in all cases murder was capitally punishable, and that in that case only there could be no exemption from capital punishment, and that is just the present law; in all other cases, except treason, capital punishment has been abolished. It was in this statute the distinction was first drawn which pervades our modern law upon the subject between murder and manslaughter or mere felonious homicide. Until these statutes, of which this was the first, which took away the benefit of clergy in cases of murder or premeditated homicide, there was no practical distinction between one kind of felonious homicide and another, since all were equally capital, and all equally escaped by benefit of clergy. And all homicide intended, whether previously designed or not, was felonious, unless justifiable, as in case of self-defence; or excusable, as in case of chance-medley; or accidental death, in doing an innocent act. This statute first drew the distinction between mere felonious homicide and murder, which was homicide done with malice prepense, or with premeditation.

(*a*) It would have been proper here to notice the law of the reign as to privilege of sanctuary, which, however, the author reserved for a subsequent section.

to give vigor and energy to the ecclesiastical court. By stat. 1 Henry VII., c. 4, it is expressly declared to be lawful (*a*) for bishops and other ordinaries to punish priests, clerks, and religious men for incontinence; for which offence they may commit them to prison at their discretion, and shall be liable to no action of false imprisonment for so doing.

These are all the alterations made in our law by statute in this reign. From the decisions of courts, we shall select such matter chiefly as relates to the new points that had lately been agitated there; to limitations of estates, to uses, to actions of ejectment and upon the case, the proceedings in equity, to which we shall add some few points of criminal law. It is not for want of materials that our inquiry will be thus circumscribed, but to avoid dwelling upon questions that have already engaged much of our attention, and that our history may keep pace with the succession of objects, and duly present them to view as they make their appearance, or undergo any change in their advancement. Allowing ourselves to enlarge a little upon these topics, we shall be content to remark, in general, of the learning of this reign, that it is of a sort with that of Henry VI. and Edward IV.; that questions are discussed with great precision, and much at large; that many points of doubt were settled; and that the Year-Book of this king is as valuable, and perhaps, on the latter consideration, more so than any other in the annals of our law (*b*).

(*a*) An act for the punishment of priests for incontinency (1 *Hen. VII.*, c. iv.), for the more sure and likely reformation of priests, clerks, and religious men, culpable, or by their servants openly reported of incontinent living in their bodies, contrary to their order; it is enacted, by the advice and assent of the lords *spiritual* and temporal, that it be lawful for all archbishops and bishops, and other ordinaries having episcopal jurisdiction, to punish and chastise such priests, clerks, and religious men, being within the bounds of their jurisdiction, as shall be convicted before them, by examination and other lawful proof requisite by the law of the church, of adultery, fornication, incest, or other fleshly incontinency, by committing them to prison, there to abide for such time as shall be thought to them discretious confinement for the quality and quantity of their trespass, and that none of the said archbishops, bishops, or other ordinaries aforesaid, be thereof chargeable to or upon any action of false or wrongful imprisonment, but that they be utterly thereof discharged, in any of the cases aforesaid, by virtue of this act. The object of this act, it is to be observed, was to enable the ordinaries to inflict temporal pains and penalties, which otherwise the ecclesiastical authorities could not enforce without statutable authority and power.

(*b*) Some of the cases are extremely illustrative. In a remarkable case in the Year-Books of this reign (8 *Hen. VII.*, fol. 12), it is said of seats in

We have before seen the opinion of Littleton upon a perpetuity created by Judge Richel, where his objections

churches—though it is probable they were only movable—that they were nuisances, as interfering with the ease and standing that belong to the people, for the church (it is said) is in common to every one; and there is no reason why one should have a seat and that two should stand; for no place in the church belongs more to one than to another, while the parishioners are not able to have their standing-room on account of these seats (*Year-Book*, 8 *Hen. VII.*, fol. 12). In the previous reign, a writ of *scire facias* was brought to bar execution upon an ancient fine against the Abbot of Nework, in Surrey, by which fine a predecessor of the abbot had granted for him and his successors that they would find three chaplains to chant in a chapel for the souls of the donor and his heirs; and the abbot said that the heir who brought the writ was patron of the chapel, and that it was ruinous; and the question seemed to be, whether the patron, the heir of the donor, or the abbot, the holder of the endowment, should repair the chapel. The question was a good deal debated, and it does not appear how it was decided (*Year-Book*, 10 *Hen. VII.*, fol. 14). But it shows that these obligations were not very carefully regarded, and that the chapels were allowed to go into decay, while those who enjoyed the endowments grudged the expense of repairs. With regard to the church, the *Year-Books* of this reign contain some remarkable cases, ominous of coming events. In a writ of annuity, the case was this:—The plaintiff made his title that all his predecessors had been seized of the annuity by the hands of the parson of a church, and all his predecessors from time immemorial; and the defendant said that his parsonage was appropriate to a priory from time immemorial—a cell of the abbey of Caen, in Normandy, and that King Edward III. seized all the lands in time of war which was temporal land of the prior's aliens, and so traced title to Henry V.; and that, in the second year of his reign, it was ordained by the authority of parliament, that all the lands so seized should remain in his possession to him and his successors forever, and so, until the reign of Edward IV., who by letters-patent granted the parsonage to the defendant, Dean of St. Stephen's, and his successors forever, discharged of the annuity. The argument in support of the action was, that the annuity charged the parson, not the parsonage; and that, though the king could have the parsonage, he could not be parson; so that, as the annuity only charged the parson and his successors, and not the lands of the parsonage, it was not extinct by reason of its being in the possession of the king, but only suspended. The argument on the other side was, that the annuity charged the parsonage, and that there was an appropriation, which had dissolved the parsonage, and destroyed the annuity issuing out of it. It was urged, in support of this view, that when the parsonage was appropriated to the priory, it was dissolved, and made parcel of the priory; and so the parsonage being gone, the annuity was gone. Moreover, it was argued, upon the act of parliament, that when it granted the parsonage to the king, it destroyed the annuity, for that the king could not be subject to such a charge; and that if a rent-charge issued out of land which was granted to the king by act of parliament, the rent was gone. It was urged, in answer, that though the parsonage was appropriated to the priory, yet the nature of the parsonage was not altered, for it remained a parsonage, and was spiritual in its nature; and that even an act of parliament could not make the king a parson; for by our law we cannot make a temporal man to have spiritual jurisdiction, for no man can do it but the supreme head. This position, however, was boldly contested by Coningsby, who said: "It is continually seen that prebends are given to infants, who yet are

to such kind of gifts are stated with great precision and earnestness.¹ However, it seems to have been a prevailing

not priests, nor in holy orders, nor have care of souls: so, although they have spiritual possessions, they have no spiritual duties to discharge; the king can as well have them as common persons. And it is to be supposed that he will have a vicar endowed." And it was added that the king often had benefices in his hands. And it was also put thus: A parson can grant to me his tithes for some years, and yet they are spiritual. And a parson can lease to me his benefices, and I shall have it by force of the lease. So it is not inconsistent that a layman should have spiritual things. And if so, that the king may have them. Further, it was said, that by the act of parliament the appropriation was dissolved. It was said, again, that the king could not be parson; and that though a party might take a lease of a benefice, he would have it, not as parson, but as lessee. But, again, it was urged that the king might be parson, for that men had parsonages for their own use; and, therefore, that the king might be parson, especially by act of parliament. And it was said that, in the time of Richard II., that certain priests who had offended were deprived of their benefices by act of parliament; and that parties could be deprived of spiritualities by act of parliament, for it was added, the spiritualities were received with temporalities (21 *Hen. VII.*, fol. 5). It was said by the chief-justice, in conclusion, that the annuity could only change the parson, not the parsonage. And as to that, the king being parson by act of parliament, I have never heard that a layman could be parson without the assent of the supreme head (*i. e.*, of the church); and in all the cases that have been put as to benefices held by the king, or any layman, to his own use, he held them by the assent of the supreme head; and a temporal act, without the assent of the supreme head, cannot make the king parson; therefore no one but the parson was charged, and not the king. As to the dissolution of the first appropriation, when the king was seized, yet the body of the house remained; but when it was given to the king by act of parliament, then the corporation of the house was dissolved, and consequently the appropriation for the parsonage was appropriate to the house. And if all the monks of a house are dead, so that their corporation is already dissolved, and if any benefice was appropriated to the house, it shall revert to him who was the patron before the appropriation. Upon this ground the action was held maintainable (*Ibid.*). In another case, one party sued another as executor, setting up conveyance of diligence from the pope directed to a bishop, who found that the will by which the plaintiff was made executor was the right will; the defendant was allowed to dispute the authority of the papal delegate, and one of the judges said, the pope himself cannot make a man executor; no one is executor but Londres, nor ever was. Another judge hereon said, that a will was disputed, the party did well to sue to the pope to have it affirmed; and although the judgment was given by the authority of the pope, yet it is a bar in our law. But an excommunication by the Bishop of Rome is no disability in our law, for that the court of Rome cannot write to him to give absolution; but where the parties plead before him, or his deputy, it is good. And the pope can as well commit administration as the ordinary, for it is a spiritual thing. But the chief-justice was of a contrary opinion. "As to the authority of the pope," he said, "I will not enter into that; but it is held in our law, that the Bishop of Rome cannot be patron of a church, for he cannot write to him" (*i. e.*, he is not amenable to the law of the land); but in the result, whole judgment was given in favor of the plaintiff, who had sued upon the authority of the papal diligences (*Year-Book, Hen. VII.*, fol. 15). When-

¹ *Vide* vol. iii.

opinion, that conditional restrictions, in some shape, might be imposed on limitations in tail.¹ In 11 Henry VII., a gift of land was made to a man in tail, with remainder to his right heirs in tail, upon condition, if the tenant in tail or his heirs aliened in fee, that the donor or his heirs might enter. This condition was held good by all the justices. However, it may be remarked, that this restriction so far differed from that against which Littleton argued, that in this the donor or his heirs were to take advantage of it by entry; there the benefit was to accrue to the next in limitation; whose entry, on account of forfeiture, was not analogous to the established course and design of such penal conditions, which were always reserved to be taken advantage of by the maker: and Littleton himself, in another place, maintains such condition to be good, when reserved to the donor; and the reason he gives is, because it was in aid and to support the design of the statute *De Donis*.² It must at the same time be observed, that this resolution was after recoveries had been allowed to bar estates-tail; and a great partiality to entails must still have subsisted, for the judges to determine such condition to be good, when the estate of the tenant in tail on which the condition was annexed might have been barred, with all claims and rights, whether by condition or otherwise. But by the opinion of the judges in this case, it should seem, that a power to restrain the suffering a recovery was considered as residing in the donor; that being a species of alienation.

The learning of uses in this reign ran into great nicety and refinement. Besides the progress they would of themselves, as a subject of legal discussion, naturally make towards attaining a more artificial form, particularly as they were now connected with questions of entails, the statute of Richard III. (a), by giving

Uses.

ever the papal authority was thus spoken of in the courts of law, it may be well understood that the privileges and immunities of the clergy, or the power of the church, would be very lightly esteemed. And, indeed, in this reign they were set at naught, whether as to sanctuary or privilege of clergy.

(a) The statute 1 Richard III., c. i., enacted that all grants, feoffments, conveyances, recoveries, etc., made by *cestui que use* shall be good against all (*vers toutes*), saving to all persons their rights and interests in tail, which was taken to mean tenant in tail in possession, and not in use; for *cestui que use* in tail had no right nor interest (24 Hen. VIII., Bro. Abr., *Feoffment al uses*,

¹ 11 Hen. VII., 66.

² Sect. 364.

a power to *cestui que use* concurrent with that of the feoffee to make common-law gifts and conveyances, gave rise to perplexities of a new sort.

40). The court then said that uses were at common law before the statute of *Quia emptores*, but were not common before that statute. In that case, a man made a feoffment in fee to his own use, and the feoffees made gift in tail to a stranger, to hold in tail to the use of the *cestui que use*, and it was held that he held to his own use. The 1 Richard III., c. i., enacted that all grants, conveyances, recoveries, etc., made by *cestui que use*, should be good as against the makers and their heirs. This statute, it is obvious, was made for the advantage of the donees, and it was so held in this reign (3 *Hen. VII.*, fol. 5), and also that it applied to leases by *cestui que use*. It only applied, it will be observed, to conveyances by the *cestui que use*. It was said in one of the numerous cases on the statute that uses were at common law before the statute of *Quia emptores*, but were not common before that statute (24 *Hen. VIII.*, Bro. Abr., *Feoffment al uses*, fol. 40). It is manifest that uses were of extreme antiquity, almost as ancient as the common law itself, and the statutes recognized then as quite common and established. It was held, however, that the effect of the statute of Richard III. was that the *cestui que use* in tail by his feoffment only bound himself according to his estate, and thus it was only binding for his life, if he had only an estate for life, as if he was tenant in tail (4 *Hen. VII.*, fol. 13). But if the tenant in tail levied a fine, and suffered a recovery to the uses of his last will, the issue might be barred by the statute (3 *Hen. VII.*, fol. 13). As already shown, conveyances to uses by fine or feoffment were made the means of devising land by last will; and thus in the exchequer chamber the new statute of feoffments to uses was discussed, and how it was to be extended in this case,—that if *A.* enfeoff *B.* to the extent that he shall be seized to the use of *C.* for term of his life, and afterwards to the use of *E.* and the heirs of his body; that if *C.* makes feoffment for life, that it is within the statute, and is good, and binds him and *B.* the feoffee; for that *B.* is feoffee, and seized solely to the use of *C.* for term of life. In like manner, if afterwards *E.* makes feoffment it is good and within the statute during the life of *E.*, and after the death of *E.* his heir; and also *B.*, his feoffee, shall not be bound by the statute, but shall be as they were at common law, for *B.* was not seized solely to the use of *C.*, unless for term of his life, and after his decease to the use of his heir, by which the heir as well as the feoffee can enter, for the statute in such case does not aid longer than during the life of *E.*, and not for his heir (*Year-Book*, 4 *Hen. VII.*, fol. 18), depriving the lord of the benefits of feudal tenure. The 4 Henry VII. enacted that if a man made feoffment of lands which he held in chivalry to the use of the feoffor, and *no will was declared*, the lord should have the issue in ward, as if the tenant had died seized. And in the tenth of that reign the case of Sir S. Delaine arose, in which it was found that he had enfeoffed the chancellor and others to his use, to *perform his last will*, and died, his heir being within age; and the question was raised, whether the king should have the ward, and it was held that he should, because *the will was not declared*, and it was implied that if it had been declared, although a last will and testament disposing of land, which the law did not then allow to be legally devised, it would have been valid to exclude the king from the wardship (10 *Hen. VII.*, fol. 10). In the case of Lord Dacre, in the reign of Henry VIII., it was actually found by office that the declaration of last will to the feoffors to his use was to defraud the king of the wardship. But it was upheld (*Year-Book*, 27 *Hen. VIII.*, fol. 8). It is to be observed, that there was a statute of Richard III., that all conveyances by

The following are instances of the sort of argument which arose upon this statute, and of the construction it

cestui que use should be good as against the grantor and his heirs; but this was enlarged by judicial construction, so as to give a power of alienation, for it was held in the reign of Henry VII. that on a feoffment in fee by the *cestui que use*, with a condition of re-entry, he could re-enter and the original feoffor could not, for that the statute said the feoffor of *cestui que use* should be good, and then the interest of the former feoffee was determined in *perpetuum* (*Year-Book*, 21 *Hen. VII.*, fol. 25). Thus, gradually, by judicial decisions in this reign, either at law or equity, the way was prepared for those great legislative changes which took place in the next reign, and which (as so often will be observed to have happened in the history of law) only confirmed or carried out changes already commenced in the course of judicial decisions. Under the statute, therefore, practically the operation of the statute of Henry VIII., turning uses into possession, was in a great degree anticipated; and so as to wills of lands. For when a *cestui que use* devised by his will, it was held good, for it was said the statute was, that all gifts, etc., should be good (14 *Hen. VII.*, fol. 14). If tenant in tail enfeoffed several, and declared his will to be that the feoffee should hold the land until the debts were paid, and then enfeoffed his son, and died, and his son entered and made a feoffment and suffered a recovery and levied a fine, and died (the debts unpaid), and his son entered, still the recovery did not ward the statute, and the first feoffment was good until the debts were paid (7 *Hen. VIII.*, 13). It should seem that by entail of uses, men in effect made wills of realty, for a declaration of uses was after all a declaration of will, and it seems to have been considered that this might be a declaration of last will. Thus, in this reign there was the following case: A man seized in fee enfeoffed others to the use of the feoffor and his heirs, and his last will was, that they should sell the land for payment of his debts; and afterwards they made feoffment for performance of his last will, and died, and then the second feoffee conveyed to a stranger; and it was argued, whether the second feoffment was good and lawful, and it was held that it was not. And it was said by the judges, that if a man was named by the will to make the sale, and he did not do it, he who was to have the advantage of the sale should have a suit in equity to compel him to do so. The common law, it was said, made a will for every man in this way, that the land which he should not limit by his will — from his heir — should be taken by his heir; and of the goods, that if he did not make a will, the ordinary should distribute them, and if he made a will contrary to that, then it was in the nature of a commission or authority in the will or testament of the deceased; and so in this case the will was a direction to the first feoffees to sell the land. And Keilway concurred, on the ground that there was a special trust reposed by the original owner in the first feoffees; which trust no one could have by virtue of the will, except the first feoffees, so that the second sale was of no effect; and consequently the heir would take the land (*Keilway*, 45). Though the statute in terms made the conveyance of the *cestui que* trust good only as against him, it was construed as making the conveyance effective. Upon this statute, it was held that if a man had feoffees to his use, and he afterwards sold the land, and the vendee made feoffment over, he was within the new statute; and so the feoffment was good to bind the feoffees on confidence. The same case of a feoffee in confidence being seized, the land descended to his heir; there the heir was in the same position as his father, and such feoffment of *cestui que use* bound the heir. But if a man was seized in fee only to his own use, and sold the land, and the vendee made feoffment, the feoffment was out of the statute, but bill in equity would clearly lie as against his heir; and thus

received in the courts. If *cestui que use* in tail made a feoffment in fee, this bound him and his feoffees during

there was a diversity between a case where a man was seized to his own use, and where others were seized to his use (*Keilway*, 42; 8 *Hen. VII.*, fol. 12; 21 *Hen. VII.*, fol. 19). It will be manifest that this system of conveyance was capable of being applied so as to alienate land by way of a devise or last will. And in the present reign several cases occurred of last wills or testaments, executed and enforced as cases. Thus, in one case, it was held that where a man had feoffees seized to his use, and by his last will would that they should sell his land, and died, and they enfeoffed to the former use, the second feoffees could sell the land (14 *Hen. VII.*, fol. 33). And the court said that if a man declare his will to be that his feoffees should alien to J. S., and he died, and they made feoffment over, the second feoffees could alien to J. S., for it was in a manner a use in him. And again, that if a man declared his will that his feoffees should alien his land for payment of his debts, and died, the creditors could compel the feoffees to sell (*Ibid.*). The close connection between wills and uses, and the tendency of these means of alienation to relax the fetters of the feudal system, will be apparent. Yet, at the same time, it was held that a use gave no possession at the common law (21 *Hen. VII.*, fol. 21), and it was not until the next reign wills of land were allowed, and were turned into legal title and possession. It was by equity these changes were originally introduced, and thus early did equity anticipate alterations in the law. Another case arose in the twelfth year of this reign which was much debated. It was found by office that one Stonar, knight, held of the king in right of his crown, and that a stranger held as knight-service, and had enfeoffed S. to the use of him and his heir, and that S. had died, leaving his heir within age; upon which the king had seized the land held by the sub-tenant in chivalry as for an escheat. The question was whether the king was entitled. It was argued that he was not, for he was not the lord; it was argued that he was, because he was chief lord, all the land in the kingdom being held mediately or immediately of him. The statute, it was said, expressly gave the benefit to the lord of whom the feoffor held (12 *Hen. VII.*, fol. 21). The case appears to have been adjourned, and reargued next year in the exchequer chamber, when it appeared that part of the land conveyed was held by the king in *socage*. And it was laid down, after long debate, that if a man held of the crown in *socage*, and enfeoffed another to his own use, and died, the king should not have the wardship. For of lands held in *socage*, he should not have advantage by the statute; and as to land held in chivalry, it applied, it was said, only to the immediate lord. The chief-justice agreed that the statute only applied to those who held of the king in chivalry, but that it extended to those who held of the king's tenants, whether in *socage* or chivalry (12 *Hen. VII.*, fol. 11). The case, often protracted, was again adjourned, and argued a third time (13 *Hen. VII.*, fol. 12). It is not stated what was the ultimate judgment, but it would appear from the notice of the case in *Brooke's Abridgment*, that it was against the crown as to land held in *socage*; and the obstinacy with which the case was contested shows the importance which was attached to it, *socage* land being then, it was said, as common as land held on knight-service. Long after this reign a case arose, in which it appeared Lord Audley had made a feoffment, and afterwards by indenture he recalled the feoffment to the extent that the feoffees should perform his will. And then—"Know ye that my will is, that they shall stand seized for payment of my debts, and after that shall make estate to me and my wife in tail," etc. This, however, was held no rule, for he limited the estate to be executed in his life; also the wife was stranger to the land, and the old use whereof was, that an es-

his life, by stat. 1 Richard III., but after his death, his heir or the feoffees might enter, for it was only a grant of his own estate; the like of a tenant for life of a use; for his feoffment could not induce a forfeiture, a use not being such property as could be forfeited.¹ It was held, that when *cestui que use* made a lease for life, the reversion was in the feoffees, who should have the action of waste, notwithstanding there was no privity. It was held, that a reservation of rent might be made on a grant under this statute, though there is no mention of it in the statute;² but it could not be made without deed. If *cestui que use* made a feoffment on condition, and entered for the condition broken, he might retain it absolutely against his feoffees; for as the fee and right was entirely out of them by the feoffment, they could not by law enter upon him; though it was held in case of a man seized *in jure uxoris*, that he, upon his re-entry, should be seized in the former right and not in his own.³

Cestui que use desired in his will that his executors might sell his woods; and this was held to be warranted by stat. 1, Richard III.⁴ If a man devised his land to be sold by his feoffees for payment of his debts, and the feoffees neglected to do it, the creditors might have a sub-

tate re-made by the feoffees, the use was not changed by the declaration, but remained in the husband, and his heirs general, as it was before (*Dyer's Rep.*, 42; 1 *Eliz.*). The subject of uses had a threefold bearing as an indirect mode of devising land by last will, as a means of altering estates-tail, or as a mode of getting rid of the incidents of feudal tenure. In the next reign, a case arose upon the statute, in which it was held that the heir *cestui que use* in fee, where the feoffees to the use had made an alteration of the first use by the addition of a particular life, should not be in ward during the life of the particular tenant, so that it would be possible, by means of conveyancing, to liberate estates from the incidents of feudal tenure recited by the statute. In that case, the Abbot of Bury brought a writ of ward against Elizabeth Bokenham, of a plea that she render up to him her son John, son and heir of T. Bokenham, the custody of whom belonged to the abbot, it was said, for that T. Bokenham held his lands of the abbot by knight-service; and the case was, that Tey and others seized of the manor of Branhall to the use of T. Bokenham and his heirs, and held the manor of the abbot by knight-service, and conveyed to the use of T. Bokenham and his wife for her life and heirs, to the use of him and his heirs; after which T. Bokenham died, leaving his son within age. And it was held that the son was out of ward, for that by the statute "the use was to ensure the possession," and that the feoffees to uses could change the uses, and had changed them (*The Abbot of Bury v. Bokenham*, *Dyer's Rep.*, 10).

¹ 4 Hen. VII., 18.

² 21 Hen. VII., 25.

³ 5 Hen. VII., 5.

⁴ 14 Hen. VII., 14.

poena. If the devise was general, it was agreed that the executors, and not the feoffees, were the proper persons to sell.¹ Notwithstanding this apparent liberality, yet so strictly was *cestui que use* tied up to the words of the stat. 1, Richard III., that all the justices held he could not make livery by attorney, because that power was not given by the act.² Again, it was holden by all the justices of the common pleas, that the *cestui que use* could not take beasts damage feasant in his own name, as he had nothing but the occupation at the sufferance of the feoffees, who might have the action, and so the trespasser would be punished twice; but those to whom *cestui que use* conveyed any interest under the statute, might justify in their own names: the statute therefore seems wholly made in favor of the alienee.³

In the seventh year of the king, it was agreed by the whole court, that execution of a statute-merchant or staple, or a writ of *elegit*, might be had against the land of *cestui que use*; for though the word execution was not in the statute, yet this sort of execution was considered as within the equity of it, being in effect a sort of *lease*.⁴ Thus it appears that stat. 19, Henry VII., was so far only a declaration of the common law.⁵ The power given to *cestui que use* by this statute was wholly unconnected with any interest; but this, such as it was, together with the common-law power and interest of the feoffees, produced such a complication of rights and titles, as must give rise to many intricate questions of law.

As to conveyances to uses, hitherto we have taken notice only of feoffments and fines to a use; but it appears in this reign that a new method had been practised, which, particularly since the statute of Richard III., had entirely superseded the necessity of any common-law conveyance: this was *by bargain and sale*. This was done two ways: either the *cestui que use* sold to another the use, and the feoffee from that time stood seized to the use of the vendee; or, the bargainer being seized of the actual freehold, sold the land to the vendee; in which case he stood seized to the use so sold. This was transacted without even the formality of a deed, and was held good even in a court of common law, by

¹ 15 Hen. VII., 11.

² 9 Hen. VII., 26.

³ 15 Hen. VII., 2.

⁴ 7 Hen. VII., 6.

⁵ *Vide ante*.

virtue of the late statute¹ (a). The validity and sense of this conveyance depended upon the fairness of the contract. The vendee having paid the money, had done that which imported in itself a good consideration; and as in the last of the two instances before stated, he could not have the land, there being no conveyance of it; and he had really contracted for the use in the former, which was the only thing residing in the *cestui que use*, it was reasonable that he should have a title to the profits; which might, even before the statute of Richard III., be enforced in a court of equity.

Thus a bargain and sale rested upon the goodness of the consideration. Indeed, in all cases, so essential was a consideration to give being to a use, that it grew to be a maxim, that where a feoffment was made without consideration, the use resulted back to the feoffor, and the feoffee was seized only to the use of the feoffor. The reason of which was this: The determination on the validity of uses being left with the chancellor, who judged according to conscience and equity, he thought that when a feoffment was made, and it remained doubtful whether it was in *use* or in *purchase*; considering that purchases were notorious, and would generally prove themselves; and that uses were secret, and needed strong reasons to support their existence, he, perhaps, thought it more expedient to put a purchaser to prove his consideration, than the feoffor and his heirs to prove the trust; by which means the intendment was always in favor of the feoffor's use, and the purchaser must produce proof of some consideration to show that it passed to him.²

(a) All that was decided in the case cited was, that the contract for sale by *cestui que use* made the vendor *cestui que use*, and so gave him an authority to enter the land in order to make a feoffment. The first *cestui que use*, the seller, sued in trespass; and the defendant set up that the *cestui que use* had sold to him, and that he entered to "make" a feoffment according to the statute; and it was held that the use was in the vendor by virtue of the sale, and so he was *cestui que use*. And it seems to have been considered that as the statute made his feoffment good, therefore he had an authority in law to enter in order to make it. But it was forgotten that the statute only made the feoffment of *cestui que use* good as against himself, and was not passed for his benefit, but for the advantage of his lessees or donees, and further, that it only applied to grants or deed of conveyance by the *cestui que use*; so that the mere contract of the first *cestui que use* was not within the act. The decision, therefore, is doubtful, and the reporter adds *quære*.

¹ 21 Hen. VII., 6 b.

² Bacon's Tracts, 317.

Hence it was that a consideration became the great point upon which those deeds of conveyance turned, that were afterwards invented in order to raise and to convey uses.

One of these was by way of *covenant*; which had been attempted in this reign for the first time, but without success. The following was a case of that kind: It was covenanted by a man and his wife and *B.* that *B.* should have the land to him and the heirs of his body; and upon default of such issue, that the land should remain to the husband and his wife in fee. This was held to be void. Another instance, where this new conveyance was again tried, was, where it was covenanted that the land and tenements of one should *descend*, revert, or remain, to his son and heir-apparent in consideration of marriage, and to the heirs of him and his wife. It was adjudged that this covenant did not change the use, for two reasons: one was, that it was a matter *in futuro*, and not executed; the other, because it was put in the alternative, and therefore was uncertain whether to remain or revert. It was accordingly held, that the parties had no remedy but by action or covenant. When another covenant of marriage of the same nature was brought in question, in 21 Henry VII.,¹ the same opinion was still adhered to.

But although these deeds were rejected by the courts of law, which seemed determined not to allow that a use should be raised by covenant, it cannot be doubted but such conveyances met with favor in the courts of chancery; which, considering the nature of a use as existing merely by contract and agreement, could hardly hesitate about decreeing the specific performance of a deed so peculiarly adapted to the purpose for which it was formed. We are induced to think they really were supported in chancery, from the many precedents now extant² of such covenants made in this reign: great estates were mostly settled in this way; and in the next reign we shall see that these covenants were expressly adjudged legal by the courts of law.

These deeds were usually made on the occasion of marriage, in order to make a settlement of some part of the

¹ 21 Hen. VII., 18, 19.

² *Vide* Mad. Form. Angl.

estate for the benefit of the widow and the issue. They were made sometimes before, and sometimes after, marriage; and were expressed to be made on that or some other consideration. The disposition thereby usually made, was, an estate for life to the husband and wife *jointly*, remainder to the issue of the marriage in tail, with remainders over. These were again qualified with provisos and conditions, upon which estates were to cease or commence, and uses were to arise or be revoked, in a style and with a length unknown to the simplicity of the common law. These novelties, however, were greatly multiplied by the fancies of conveyancers in the next and subsequent reigns.

The joint estate for life to the husband and wife was intended as a maintenance for the wife, if she *survived*, in lieu of her dower, of which she was deprived where her husband's estate was in use and not in seisin. This was now the case, with much of the landed property of the kingdom; and therefore these *jointures*, as they were called, were become very common.

The most important decision in this reign was that which gave a new efficacy to ejectments, by adjudging a recovery of the term as well as damages; the consequence of which was, that writs of assize of novel disseisin, with writs of entry and of right, went out of use; and a title to land was, in the subsequent periods of our law, generally tried by ejectment (*a*).

(*a*) There was a close connection between this action for forcible entry, the old assize of *novel disseisin*, and the action of ejectment. All three were remedies for recovery of the possession. The assize of *novel disseisin*, which was the most ancient, and was the remedy for disseisin or dispossession of the freehold, was, as Lord Coke described it, *festinum remedium*. The action of forcible entry was intended to afford a still more speedy remedy. The operation of the statute, and the relation of the two remedies, may be well explained by a case from the Year-Books, in which the judges said: "If I am seized of a lawful possession, and continue peaceably for three years without interruption, I can defend my possession with force against all others; and if I am disseized with force, and enter on the disseizor with force, and it is found before the justices of the peace, by which the disseizor is restored to possession, I can re-enter peaceably, or have an assize" (22 *Hen. VI.*, fol. 17). It was the great object of the action of forcible entry to obtain summary restitution; and it was held in this reign that it could be obtained when the case was removed into the superior court (4 *Hen. VII.*, fol. 18; 14 *Hen. VII.*, fol. 28). And it is to be observed that the party entitled might always enter peaceably; and that even if he entered with force, if he had right of entry, there could be no action against him, although there might be an indictment and restitution thereon (9 *Hen. VI.*, fol. 19;

An action *de ejectione firmæ*, or ejectment, we have seen, was a remedy by which a lessee, being dispossessed of his term in land, recovered damages

Ejectione firmæ. 14 *Hen. VII.*, fol. 28). And if the title was found in the action, it made an end of the action as between the parties (15 *Hen. VII.*, fol. 17). Thus, in effect, the action of forcible entry turned, as between the parties, upon the right of entry or of possession. In this reign it was laid down in an action of forcible entry that it comprised title; for the writ complained of an entry in the land, and therefore the defendant could show his entry lawful; and the law understood that the action was brought on title to the land. At the same time, it was said that it was a hasty remedy for the recovery of possession; and this was equally so of an assize of *novel disseisin*, to which it was compared, and of which it was said that though the action was founded on disseisin, yet the plaintiff recovered the land. It was laid down as clear, however, that if, on the action of forcible entry, the entry was found lawful, the judgment would be a bar in an assize of *novel disseisin* for the same entry (*Year-Book*, 11 *Hen. VII.*, fol. 16). It was well recognized in this reign that the action of forcible entry was previously understood to be brought in respect of the freehold; and "that though the tenant for term of years could have the action, yet it should be understood that it was brought by the tenant of the freehold" (*Year-Book*, 1 *Hen. VII.*, fol. 13). This was exactly the converse of what afterwards happened to the action of *ejectione firmæ* before it was converted to the uses of the modern action of ejectment, only that, although it might be brought by the claimant of the freehold, it was understood to be brought by a termor. Thus the idea of the adaptation of the one action to the trial of title to the freehold was derived from the adaptation of the other action to the trial of the title to the termor. The summary remedy by writ of forcible entry was for restitution upon a sudden expulsion by numbers and with force and violence; and as in this reign, by reason of the execution of the law, this species of offence began to become less frequent, and on the other hand the necessity arose for the trial of titles, the action of ejectment, founded at first upon a mere wrongful entry, and afterwards upon a supposed entry, came more and more into use, and at last superseded the more summary remedy, adapted only to cases of actual force and violence. Cases of forcible entry occurred, indeed, all through the Tudor dynasty, but they became less and less violent. Thus in one which occurred in this reign it appeared that only ten persons took part in the expulsion (*Rednesh's Case*, *Hen. VII.*, fol. 19) — a great change from the reign of Henry VI., when multitudes of armed men used to lay siege to a place. But as force became repressed, and times became more peaceable, there arose a necessity for some remedy for those entitled to the possession of land, in cases where they had not a freehold, so that they could not bring assize or real action, and had never been dispossessed, so that they could not have action of forcible entry, and had no desire to run the risk of a breach of the law by attempting a forcible entry. In such cases the action of ejectment, or, as it was still called, *ejectione firmæ*, was available. It lay against any one who held the land against the lessee, and it was a specific remedy for the recovery of the land. It has already been shown, in a previous volume, that the author was entirely mistaken in supposing that it had ever been otherwise. It was, however, originally a remedy for a termor, but it was by practice adapted to the trial of freehold title in the way in which the action for forcible entry, though originally and properly a remedy for the freeholder, was made available for the termor, by the simple expedient of one party bringing the action in the name of the other, and so the termor

against the wrong-doer, for the trespass in ejecting him. It had therefore a different object from the other remedies in such cases; one of which was a writ of covenant, the other a writ of *quare ejecit infra terminum*. The first lay only against the lessor, and had long ceased to give the plaintiff any restitution, but merely damages for the ejectment; the second lay only against the alienee of the ejector. The *ejectione firmæ* gave a remedy against the ejector, but it was only in damages; so that with all these forms of action, a termor for years might, notwithstanding, be actually deprived of the possession of his term, without restitution by the common law, if the land continued in the hands of the ejector. Leases for years had now grown to be of greater value, from the length to which it had become the practice to grant them: accordingly, the court of chancery began to take that cognizance of them which the common law refused, but which they at present deserved; and, by a rule of redress, in which that court much delights, used to decree the ejector to make a specific restitution of the land for the remainder of the term (a).

The courts of law seemed lately to incline towards adopting this method of doing substantial justice. In the reign of Edward IV., we have seen it was declared by Fairfax,¹ that a plaintiff in ejectment should recover

brought the action of forcible entry in the name of the freeholder; so the freeholder brought ejectment in the name of the lessee; first real, and afterwards nominal. Such was the real origin of the modern action of ejectment. There is no such case in the Year-Books of the year, nor of the reign. The only case in the Year-Books of the year is one of forcible entry, in which it is said there would be restitution.

(a) It will be observed that no authority is cited for this, and the editor is not aware of any, nor does it seem that such cases could come within the scope of equity; and seeing that there was, as has been seen, a legal remedy, the author, as has been shown in a former volume, erroneously imagined that there was not a legal remedy, and hence fell into the common error of supposing that it must be a case for equity. That the remedy for specific performance of covenants was lost at law through the ignorance of the practitioners, the judges had said in the reign of Edward IV. And Fairfax, C., said the court of king's bench could grant an injunction (*Year-Book*, 21 *Edw. IV.*, fol. 23; 16 *Edw. IV.*, fol. 9). But that would have been only a remedy against the lessor or his covenant: and as regards a stranger, who expelled the lessee, it is not easy to see what equity there could have been. Either he would be entitled or not; and if not, he would be a mere wrong-doer, against whom the law gave more than one specific remedy; so there could be no equity.

¹ *Vide ante.*

possession of his term, as he would in a *quare ejecit infra terminum*; and it was accordingly so adjudged solemnly in 14 Henry VII.¹ A copy of the record of this case is still to be seen in Rastall,² where the judgment is, *quod recuperet terminum suum prædictum*; a judgment not warranted by the original writ, which goes only to damages for the trespass, without any hint at restitution. Soon after this important resolution, ejectments were applied to recovering possession of land, and trying titles, as a remedy more simple, and less inconvenient and tedious, than the multifarious and complicated proceedings in the great variety of real actions.

That an ejectment in this manner might restore the possession where a *bona fide* termor in lawful and permanent possession was actually ejected, is obvious enough; but how the same proceeding could be applied to try titles, in all cases, it is not perhaps so easy to imagine (a).

It should seem that the first way of bringing ejectments to try titles was plain and regular, differing nothing or very little from what this action was, when brought to redress a real trespass, and to recover damages for it. Some-

(a) It was simple enough, as already has been seen. Just as the termor was allowed to bring an action of forcible entry, although it was properly the remedy of the freeholder, in order to recover possession, by means of a writ of restitution, so the freeholder was allowed to bring the action of ejectment in the name of the termor, in order to recover possession in his person, that is, in the person of his tenant, payment of rent being seisin in law. The same principle applied in civil cases. In either action, the putting the tenant in possession restored the seisin to the freeholder. In process of time, it was found convenient to suppose a lease and a tenant for the purpose of trial of the title, which could as well be tried in the name of a nominal lessee as of a real practical lessee. And this was effected by the process of the court. It was well settled in subsequent reigns that the lessee could sue for forcible entry, and have restitution in the name of the freeholder. Thus in the reign of Elizabeth, one was indicted for forcible entry, and it was stated that *A.* was lessee for years, and *B.* was seized of the freehold; and the indictment alleged that the defendant disseized *B.*, and did not allege an expulsion of the lessee; but it was held good without alleging the expulsion of the lessee for years, for he was not in, only to have restitution (*Lorester's Case*, *Dyer*, 141, *in notis*). So in another case, in which the lessee was ejected with force, it was said that the restitution should be to the freeholder, and that the lessee ought to sue in the name of the lord to have restitution (*Sir Matthew Arundel's Case*, *Dyer*, 141, *in notis*). The action of forcible entry, however, proceeded in the name of the freeholder, and unless he sued, or the action was sued in his name, the lessee had no remedy, for he could not bring the action himself, though the freeholder could sue on an expulsion of the lessee (*Dalabar v. Lyster*, *Dyer*, 141).

¹ Jenk. Cent., pa. 67.

² 14 Hen. VII., 244 b.

thing was to be contrived in exact conformity with such original objects. As a term was to be recovered, a term must first be created, and an ejectment from that term must be effected, upon which the action was to be grounded. It is probable, then, that a person claiming title used to enter on the land, and there seal a lease to *A.* This transaction might, or might not, be known to the tenant in possession. The construction of law upon this would be, that, of the two tenants, he was the trespasser who had no title to the possession; and he barely by being there, without any other act, committed, in law, an ejectment of the other; an ejectment, like a disseisin, being a wrong which a man might admit himself to have suffered, merely to take advantage of the remedy which the law in such circumstances would give him. *A.*, the lessee, would, for the present purpose, suppose the title to possession to be in himself; and the two requisites for this action being obtained, he would serve a writ of trespass and ejectment against the tenant in possession, declare, and go on to trial. Then the plaintiff *A.* produced the title of his lessor, and the defendant the tenant produced that of his lessor, and so the right was completely examined; for the title to make the lease being inquired into as a prefatory matter, they thereby collected who was the trespasser, which was the direct point of discussion in this action.

This seems to have been the obvious, and was probably the first, way in which a title to land was tried by ejectment. It was regular and simple, consistent with the process and proceeding in other actions; but the legal notion of trespass and ejectment was of such latitude as to leave an opening for fraud and artifice to introduce some singular novelties into the proceeding by ejectment. If the tenant might be considered as a trespasser by continuing in the possession after the lease made to *A.*, so might every one of his servants, and every stranger who *casually* came on the land; and these, equally with him, might be made defendants, and put to show by what authority they were there. The person claiming title would sometimes take advantage of this, and get a friend to come on the premises just after *A.* had been put in possession by sealing the lease. This made him instantly, in law, a trespasser and ejector. He was served afterwards with a writ and declaration, upon which he would give the plain-

tiff judgment by default; and a *habere facias possessionem* issuing, the tenant in possession was turned out, in order that the plaintiff might have full and clear possession according to his judgment; the tenant being put to the necessity of bringing an ejectment, in his turn, to recover back the land.

A practice like this, so unfair and unjust, could not long subsist: the courts took it up, and, in order that the tenant might always be in a capacity to defend himself, made it a rule, that execution should not issue, till the ejector, if a stranger, had given notice to the tenant that an action was commenced against him, submitting to him whether he would defend it; upon which the tenant was allowed to defend it, in *his* place. However, notwithstanding this rule took away all the advantage gained by these clandestine ejectments, the practice of proceeding first against some stranger, called since a *casual ejector*, was still kept on foot; for the judgment obtained in this manner remained still good in law, notwithstanding the tenant was admitted to try his right; it put him under the necessity of defending the action, lest he should be turned out; and, should it be determined by a jury in favor of the plaintiff, execution would issue on that much sooner than could be obtained by judgment on the verdict.

Thus did ejectments receive a new form, owing to circumstances necessarily attending them, and to certain consequences following from the legal properties of a trespass. As there can be little doubt but an ejectment was conducted in the simple manner we have above supposed, when first made use of to this purpose; so there can be little doubt that it became, very soon after, the practice to make a casual ejector, and to proceed as just related; the lessee and casual ejector being real persons, as well as the entry and ejectment real facts. Such the practice continued till the end of Queen Elizabeth's reign, and some years after, when the practisers got into the habit of shortening the process very materially, and the judges endeavored to expedite this useful action by some orders of court; so that, altogether, it is now become a very singular and complicated proceeding.

Though it had been adjudged that the term should be recovered in ejectment, it cannot be supposed that damages were not, as formerly, recovered for the injury sustained

by losing the intermediate profits; judgment therefore used to be as well for the mesne profits as the term. In after-times, when an ejectment came to be considered rather in the light of a real action, the plaintiff rarely prepared himself to prove the actual damages; upon the ejectment therefore he took only nominal damages, and afterwards brought a new action of trespass for the mesne profits; of which action there is no mention till some time after the reign of Queen Elizabeth.

As this action of ejectment, in the form of it, is for the trespass, and not for the right, every fresh trespass, which could easily be effected in the way above stated, is a fresh cause of action, and the right will every time be incidentally examined; very different from trying a right in some real action, where a judgment once given was either a final bar, or drove the party to a writ of a higher nature, very often more tedious in its process. From hence it followed, that a title might be tried over and over again between the same parties, though they had each had verdicts against them. The gratification of trying a title more than once, together with the ease with which this action was conducted, contributed to make it a favorite both with our courts and with suitors. This innovation gave the last blow to real actions, which, from the period when ejectments came into practice, went into disuse: a revolution that at once consigned to oblivion at least one-third of the ancient learning of the law.

Whether this was a change for the better, has been doubted by lawyers of some knowledge and experience. On the one hand it has been said, that real writs were in their nature so special, and in their application so unaccommodating, that they were very unmanageable instruments in the hands of the practiser. Some were to be brought in a particular court; some lay only between particular persons; others for and against those who had only particular estates; with various other circumstances that were requisite, antecedent to the bringing of the action: all these were at once supplied by an ejectment, which requires nothing but a present possession in the defendant, and a right to it in the plaintiff. On the other hand, the precision of the proceeding in real actions, where the matter in question was thoroughly canvassed in pleading, and reduced to a simple point before it was trusted to a jury,

is thought to be ill changed for the present course, where the whole question is at once sent in the gross to trial upon the general issue, without any previous attempt to simplify or decide it with less circuitry and expense. As to the length of process, and other delays in real action, they, it is said, might have been easily corrected by act of parliament.

Though the practice had begun of applying ejectments to this purpose,¹ there are no questions arising upon such actions in the Year-Book of this reign. Many titles to real property are there debated in trespass and replevin. But the remedies by real action continued still to be the practice of the time, though destined to give place to this new-modelled remedy in the next and succeeding reigns (*a*). With real actions fell a great part of the business of the common pleas; in them that court had possessed an exclusive right of judicature, which now begun to be imparted to other courts. Land, as a subject of action, was now in the same predicament as other matters of contract, and might be decided upon, in an ejectment, in any court in Westminster Hall. The king's bench, which from a criminal jurisdiction had long before possessed itself of personal actions, by help of fiction and intendment, received its share of this accession; and from thence derived an addition to its civil business, which was greatly increas-

(*a*) The author was in error here, and his error arose from his having entirely overlooked the actions of forcible entry, which, by reason of judicial decisions, he does not appear to have been aware of, became used in this and the ensuing reign for the purpose of trying titles, and was also used by termors, who for that purpose used the name of the freeholders, and in their names recovered possession of the premises. Thus there was no necessity for the use of the action of ejectment, which therefore did not become common either in this reign or the next, nor until the reign of Elizabeth; the reasons for which will be in due time expounded. For the present it is sufficient to say (as Lord Hale truly observes) that at this time it was the action of forcible entry which superseded real actions. In that action speedy restitution was recoverable; and although it was properly a remedy for a freeholder, yet by the course already mentioned, the termor used it in the name of the freeholder; and as the lessee's possession is the seisin of the lessor, the lessee's recovery of possession was the lessor's recovery of seisin. It was indeed this use of the action of forcible entry by the termor which afterwards suggested the analogous use of the action of ejectment by the freeholder. In each case one party used the remedy proper to the estate of the other by the simple process of using it in his name. This is one of the most instructive illustrations of the power of practice in moulding the law of procedure and the power of the courts over their practice.

¹ Rast. Ent., 243, 244.

ing from other causes. This was another consideration that contributed to bring this action into vogue. The practisers in the court of king's bench and exchequer saw a medium by which they might partake in the valuable practice of the common pleas, and of course would give every credit to such a contrivance.

The opinions delivered in the reigns of Henry VI. and Edward IV. in favor of actions upon the case, for the non-performance of a promise, were confirmed by the train of decisions in this reign. In 3 Henry VII. an action was brought against a defendant, who, for a sum of money, had undertaken to procure a lease for a person; but instead thereof he obtained it for himself, Actions of
assumpsit. in deceit of the plaintiff. When it was objected, upon the old notion, that nothing having been done, no action would lie; as there was no *mis-feasance*, but merely a *non-feasance*, Brian demanded, whether if he promised, upon consideration, to make a feoffment to one person, and afterwards made it to another, that would not be a great *mis-feasance*?¹ endeavoring in this manner to satisfy the scruples of such as still adhered to the ancient opinion. We are told that the court agreed with him. Conformably to this decision, it was declared in 21 Henry VII. by the whole court, that an action upon the case would lie as well for a *non-feasance* as for a *mal-feasance*;² and this opinion was on another occasion again recognized;³ at which time it was said, that if a man bargained that another should have his land in fee for such a sum of money, and neglected making an estate accordingly, an action upon the case would lie without any need of suing a subpoena in chancery.⁴ As the necessity of recurring to a court of equity to establish such agreements was not now so absolute as before, there is no doubt but suits on such questions fell back again into the old channel of the common law. The prodigious advantage of this common-law remedy, to substantiate promises and undertakings, was soon discerned by the legislature, which, on this account, as well as on account of the other applications that were made of this action, in this reign passed an act which gave to the action upon the case the same process as was before in an action of debt.

There still remained doubts in what particular cases law-

¹ 3 Hen. VII., 14.² 21 Hen. VII., 30.³ Ibid., 41.⁴ Ibid.

wager should be allowed, and in what not. In the reign of Henry VI.¹ it was doubted by Newton, Paston, and Aston, justices, whether in an action of debt brought against an abbot for things sold to his predecessor, with an averment that they came to the use of his house, the defendant should be permitted to wage his law. This point was again agitated in the beginning of this reign, when Brian held, that law-wager would not lie; saying, that a defendant could never wage his law, unless where of necessity and by common presumption, he must have notice of the cause of action.² In the latter part of this reign, the same question came before the court, in the Prior of Dunstable's case, when it was held by all the justices, except Brian, that law-wager would lie.³ It was there urged, that a man might wage his law, in many cases, on the contract of another. Thus, a lord, if found, on account with his bailiff, to have received more than was due in debt by the bailiff, to recover such surplus might wage his law, though a stranger to the contract, which in fact commenced with the auditors; the same if the bailiff had been found before auditors to have been in arrear: so in debt brought on a recovery in a court-baron. In like manner, in the case at bar, though the prior was a stranger to the contract, yet he was charged by it. It was said, that this is not like the case of executors, who, it is true, are not allowed their law-wager; but that is not for want of privity, but because they are not liable to an action on a contract of the testator. The action against executors is in the *detinet*. This is in the *debet*; for he is not a stranger to the contract, which was made in favor of the house, of which he was the head, but rather a principal party; and if this debt had arisen *tempore vacationis*, it was a settled point that the new prior might wage his law.⁴ In an action founded on a statute, it was held, that a defendant should not wage his law;⁵ though this point of law seems somewhat questioned in another case towards the close of this reign.⁶

The chancellor continued in the exercise of that equitable jurisdiction, which had been gradually assumed by his predecessors (a). Besides questions upon uses, the

(a) As has been shown, in the notes upon this subject in a preceding volume, equity was in truth the development of law; and hence most of the

¹ 21 Hen. VI., 23.

² 21 Hen. VII., 2.

⁵ 10 Hen. VII., 18.

³ 1 Hen. VII., 25.

⁴ 13 Hen. VII., 3.

⁶ 21 Hen. VII., 14.

grand subject of discussion in that court, we find the following points were there considered.

The first case we shall mention is more remarkable for the manner of the judge than the matter of the inquiry. Two persons were appointed executors, and one released a debt due to the testator, without the assent of his companion. It was suggested in a bill in chancery, brought by the other executor, that the will could not on that ac-

great heads of equity were really deduced from some of the ancient writs of the common law: as, for instance, the jurisdiction in equity as to granting commissions to ascertain boundaries, was deduced from the old writs *de perambulatione facienda* and *de rationalibus divisis* (3 *Vesey Jun.*, 129). So suits for contribution were founded on the principle of the old common law writ *de contributione facienda* (*Fitz. Nat. Brev.*, 162; *Harbert's Case*, 3 *Coke's Rep.*, 11; *Dering v. Winchelsea*, 2 *B. and P.*, 270; *Cowel v. Edwards*, *ibid.*, 261). So of numerous other titles or heads of equity; they had their origin in the common law, or rather perhaps in that civil law which, as was shown in the Introduction, was the fountain both of equity and law. The equitable jurisdiction of the court of chancery continued to be exercised in this reign, though it was at first a matter of some difficulty, especially as the chancellors were ecclesiastics, to distinguish between an idea or measure of equity which might be dictated by morality or good conscience, and that measure of it which was capable of being administered in a court of justice; in other words, between moral equity and legal equity. A case occurred early in the reign which affords an amusing illustration of the difficulty. One of two executors had released, without the consent of the other, a debtor to the estate, and a bill in equity was brought against him and the debtor. It was argued that the thing was not remediable, as each executor had full power, and the release was good. The chancellor gave relief, however, and said, *Nullus recedat a curia cancellariæ sine remedio*; and it is contrary to reason that one executor should have all the goods or release, as if he were the sole executor. The counsel for the executor urged, "The law of the land is for many things, and that many things are suable here, which are not more suable at common law; and so some are matters of conscience between a man and his confessor, and this is one of them." The chancellor answered to this: "I know well that every law is, or ought to be, according to the law of God, and that the law of God is, that an executor who is of evil disposition shall not spend all the goods; and I also know that if he does not make restitution when he is able, he shall be damned in hell (*il serra damne in hell*), and so give a remedy for such a case as according to conscience." But then the chancellor went on to show that his view was according to the principles and analogies of the common law. He showed that, in reality, the will conveyed a joint authority to both executors, and that the testament gave them their authority, and the last will of their testator; and therefore, that if they acted contrary thereto, it ought to be remedied (*Year-Book, Hen. VII.*, fol. 5). Here we observe the true idea of equity, as administered in chancery; an equity in accordance with good conscience and justice, but also governed by the principles of the common law. It is manifest that, on the same principle, conveyances to trust or uses would be protected in equity, and so they were firmly established. And this equitable jurisdiction, conjointly with that system of conveyancing, tended to break down the feudal system, or, at all events, to mitigate its oppressive incidents, as it in many other ways gave relief from the rigor of legal rules.

count be performed ; and therefore a subpœna was prayed against the executor, and the person to whom he had made the release. It was there argued, that the plaintiff in equity was without remedy, for every executor has an entire power in himself ; and as none could do that which his companion might, the release was good. " But," said the chancellor, " it is against reason, that one executor should have all the goods, and give a release by himself. I know very well that every law should be consistent with the law of God, and that law forbids that an executor should indulge any disposition he may have to waste the goods of the testator ; and if he does (says the chancellor with some emphasis), and does not make amends, if he is able, he shall be damned in hell." But, upon the point of equity, he thought there should be a remedy ; " for the words of the testament are, *constituo tales esse executores meos, ut ipsi disponant, etc.* Their power is hereby joint, and not several ; and therefore if one does an act without the other, he does it without a warrant. Again, it is *pro salute animæ meæ, etc.*, and therefore if they dispose it otherwise, they do what they have no authority for. At common law (says he), if a commission of the peace issues, this gives no jurisdiction to try felons ; and if a letter of attorney is given to make livery of one acre, a livery of two is without warrant, and void. Now, in this case, the testament is their warrant, and the last declaration of the testator's will ; and should they exceed that, there must be some remedy, as I conceive." Thus argued the chancellor ; but the case stood over for further consideration.¹

Where a cognizee, in a statute-merchant, had extended the land, and the cognizor sold the land and suffered a recovery thereof, it was held, that as he could not falsify the recovery, there should be a remedy by subpœna for the tenant. Again, where an obligation was paid without a release, and where one was bound to I. S. to the use of W. N., and I. S. released the debt, in both these cases there was relief by subpœna.² Respecting the process of the court, it was held, that the penal sum in the subpœna was *in terrorum* ; and if it was not obeyed, the chancellor might assess a fine upon the

¹ 4 Hen. VII., 4 b.

² 7 Hen. VII., 11. ●

party. This assessment being a judgment, it was held a *scire facias* might issue upon it.¹

We next proceed to some questions arising in our criminal law. Notwithstanding this king's reign is marked by several state-prosecutions, little is to be found in our books upon the law of treason: the case of Humphrey Stafford is the only one that is recorded. It was there resolved, that privilege of sanctuary could not be claimed in cases of high treason by prescription, without an original charter before the time of memory, because it so materially touched the king's prerogative; unlike a claim to have waifs, strays, and wreck, Of treason. which might be prescribed for. In the same manner, where a person claimed the goods of felons, outlaws, and cognizance of pleas, he was obliged to show a royal charter, and allowance in eyre, after time of memory. On the same occasion, the judgment of high treason was pronounced as follows: that he should be carried back to the Tower of London, should be put on a hurdle, and drawn through the middle of the city to Tyburn, and there hanged by the neck; before he was dead his heart should be cut out, his head cut off, and his body divided into four parts, to be at the disposal of the king, and *Deus misereatur animæ ejus, etc.*²

The nature of principal and accessory in treason does not seem to have been thoroughly understood, as it was afterwards settled. A man had been attainted of treason in counterfeiting the coin; and another was indicted, *quòd sciens, etc., illum felonice hospitavit manutenuit et confortavit, etc.*, and some doubt arising whether he could be feloniously accessory to the treason, the point was adjourned for the opinion of the court. It was then argued by Brian, one of the justices, that he might; for counterfeiting the coin was felony at common law, which felony was not done away by the statute making it treason; and the proclamation on the exigent gave notice that an outlawry impended both for treason and felony. In truth, every reason implied in it a felony; and therefore, said he, it was clear law that should any one be attainted of treason on stat. 8 Henry VI., c. 6,³ for burning houses, after sending a threatening letter, a man might be indicated *quòd*

¹ 10 Hen. VII., 5 a.

² 1 Hen. VII., 24.

³ *Vide* vol. iii.

felonice illum hospitavit, etc., because burning houses was a felony before. But Hussey, the chief-justice, said, that as this was now become treason, there could be no accessory *felonice*; nor could there be such a thing as accessory *proditorie*; which seems to have been the better opinion.¹

The distinction between lawful and unlawful acts was always the governing consideration in imputing guilt or innocence, when a death was occasioned without the intention of the slayer (*a*). It was laid down by Fineux, chief-justice, that where two played together with sword and buckler, or jousted, and one killed the other, it should be accounted felony; because, though these diversions were suffered by law, yet it was not lawful to use them but at the command of the king. It was clear law that should one man beat another, without any intention to kill him, and the man died, it was felony, on account of the first act being unlawful; which was a very different accident from that where a man, shooting at a bull, or throwing wood from a house, chanced to kill a man; this being homicide *per infortunium*, by our old law.² However, in the principal case, it seems that Fineux retracted the opinion above mentioned; and in the first year of the next reign laid it down to be felony to kill a man in jousting, or other diversions, notwithstanding the king's command, for such command was illegal.³ It is obvious that the legal opinions on a question like this must, in a great degree, be governed by political considerations and the humor of the times.

When it was thus positively laid down that the persons

(*a*) Everything which relates to the law of homicide is of immense importance, and in this reign we find the origin of the modern law upon the subject, and of the distinction drawn between murder or premeditated homicide and felonious homicide, which meant homicide intended (or the natural result of an act intentionally done), though not previously designed or premeditated. Every intentional act of homicide was and is still felonious, unless justifiable and excusable in law, as self-defence, or by chance-medley, as where it has occurred in doing an innocent act. But when it was the natural or probable result of an unlawful act, then it was felonious; and at common-law being felonious, all felonies being capital, it was punishable with death. Hence there was no practical importance in a distinction between one kind of felonious homicide and another until the statutes as to benefit of clergy being taken away in cases of murder, the effect of which was to make them always capital, whereas, by reason of benefit of clergy, mere homicide was not.

¹ 3 Hen. VII., 10.

² 11 Hen. VII., 23. *Vide* vol. ii., c. viii.

³ Bro. Coron., 229.

so shooting or throwing wood were not guilty of felony, it seems reasonable that those passages should not be construed without some qualification, but should be limited in the manner laid down by Bracton ;¹ namely, if it was done in a place not publicly frequented, and the probability was that no danger could ensue : indeed, it seems hardly otherwise to be a lawful act.²

It was no unusual course at this time, in cases of death, where the prosecutor thought it would not turn out to be felony, to lay the indictment as for homicide *se defendendo*, or otherwise, as the real case might be. On an indictment of this kind, and an application in chancery for the usual pardon under the statute of Gloucester,³ some serjeants were of opinion, that there was no need of a pardon, because the justices ought, they said, to discharge the party without an arraignment ; and it was only on an indictment for felony, and after the jury had found the defendant guilty *se defendendo*, that the above application was requisite. But the justices thought otherwise, namely, that the indictment should be tried, and on a conviction, a pardon should be had to save the forfeiture.⁴

There had been always great tenderness towards infants who had subjected themselves to the penalties of the law by the commission of crimes. The rule, however, that *malitia supplet ætatem*, seemed to be founded on a sensible distinction, and was universally adhered to in after-times. A boy of nine years old had killed another of the same age, and confessed the fact ; but it was also found that when he had committed the murder, he hid the body, and made an excuse for the blood upon him as if it had followed from some accident to himself. This seemed to come within the construction of the above rule, and the justices were of opinion he should be hanged.⁵ In another case, where two boys were keeping sheep, and one, being between ten and twelve years old, killed the other, and hid the body among the corn, and confessed the whole fact, the execution was respited for the opinion of the justices, the greater part of whom thought he should be hanged.⁶ If a blow was given in one county, and the party died in another, an appeal might be brought in either, and the fact would be tried by a jury of both ; but

¹ *Vide* vol. ii., c. viii. ² 1 Ch. 9. *Vide* vol. ii., c. ix. ³ 3 Hen. VII., 1.

⁴ 21 Hen. VII., 29. ⁵ 4 Hen. VII., 2. ⁶ 3 Hen. VII., 12.

an indictment in such a case (notwithstanding some *dictums* to the contrary)¹ would lie in neither county, as the jurors have authority only to inquire *pro corpore comitatûs*, and no more.²

It has not fallen in our way to say anything on the crime of arson since the reign of Edward I.³ It was then said to consist in burning the corn or house of another feloniously. After that there is an entire silence in our books as to the nature of this felony. We find, in this reign, that a man was indicted for that he feloniously in the night had burnt a *barn*; and because the barn was adjoining to a house, this was held a felony at common law, and the offender was hanged.⁴

Some questions of larceny, similar to the famous one in the time of Edward IV., were again agitated in this reign.⁵ It was propounded by Hussey, who was then chief-justice, whether, if a shepherd took the sheep, or a butler the plate, under his care, it could be called felony; he himself thought it was, and related the case of a butler who was hanged under such circumstances: to which a similar case was added by Haugh, of a goldsmith, who had taken some things that were intrusted to his charge. In answer to these, Brian argued that it could not be felony, because neither of these persons could be said to take the things, *vi et armis*, while he had them under his care: and of this opinion were the justices.⁶ This was giving a blow to the determination in the time of Edward IV., and expressly contradicted some cases that were there taken for settled law, and argued upon as such—especially that of the butler. However, we find this case of the butler was understood otherwise some years after, and a distinction was taken between the possession a butler has while in the master's house, and the possession of a servant intrusted out of the house. It was propounded by Serjeant Pigot, in the court of king's bench, to Serjeant Cutler, in this way: If I bail a bag of silver to my servant to keep, and he goes away with it, can this be felony? Cutler said, Yes; for as long as he is in my house, or with me, that which I have delivered to him is adjudged in my possession: thus, if my butler,

¹ 7 Hen. VII., 8.

² 4 Hen. VII., 18; 6 Hen. VII., 10.

³ *Vide* vol. ii.

⁴ 11 Hen. VII., 1.

⁵ *Vide ante*, c. xxiv.

⁶ 3 Hen. VII., 12.

who has my plate in his custody, runs away with it, this is felony; the same if a person having the care of my horse goes off with it; because in both these cases the thing remained all along in my possession. But if I deliver a horse to my servant to ride to market, and he rides away with it, this is no felony; because he came by the lawful possession of the horse by delivery out of my custody. The same if I give him a bag to carry to London, or to pay away to some one, or to purchase something; if he goes away with these it would not be felony, because they were out of my possession, and he had lawful possession of them himself. To this Pigot assented, adding that he might, in all these cases, have an action of detinue or accompt;¹ which idea of *possession* is consonant to one of the principles laid down in the case so often alluded to. Another case of *property* and *possession* was also conformable with an opinion delivered in the foregoing period, namely, that a man who retook his own goods in order to charge the bailee, was guilty of felony.²

It was common, in an appeal of mayhem, for the defendant to pray an inspection of the mayhem assigned, either by proper surgeons, or by the justices; and the opinion given by either was peremptory, and finally determined the cause.³ It seems to have rested with the justices whether they would grant such inspection or not; and if upon examination a doubt arose whether it was a mayhem or not, the justices might compel the party to refer it to the country.⁴ Upon the occasion of a felon being taken out of the officer's hands as he was leading to execution, it was submitted to the court of king's bench, whether the rescuing a felon was felony or not; and it was held, that such rescuers were principal felons, and not accessories; and it was said to have been so determined in the reign of Edward IV. Such rescue must appear not upon the return of the sheriff, but by an indictment.⁵

The question which had been so long agitated, how far the accessory should be favored by the clergy or other privilege of the principal, was brought forward again in this reign. In the exchequer chamber, before all the jus-

¹ 21 Hen. VII., 14.

² 5 Hen. VII., 18.

³ 21 Hen. VII., 33. On a former occasion it was thought not to be peremptory. 6 Hen. VII., 1.

⁴ Ibid., 40.

⁵ 1 Hen. VII., 6.

tices, it was debated what should be done where the principal and accessory were arraigned, and both found guilty, and the principal demanded a book before judgment given. Hussey was of opinion that the accessory should have no advantage of this; for if a principal was outlawed, the accessory should be put to answer, though the principal was not attainted of the felony, but only of the contempt; but it was held by all the justices and serjeants, that in this case the accessory should be dismissed. To this the reporter adds, that where the principal confessed the fact, and demanded a book, the accessory should not be arraigned, because no *judgment* was passed against the principal.¹ Notwithstanding this, we find in the same year that the common course was to arraign the accessory, and if he was found guilty, he was hanged.² This point, therefore, still remained to be settled. It was the opinion of the justices of both benches, that an accessory *before* the fact, though acquitted, yet lost his goods, if he fled, the same as the principal felon; but not the accessory *after* the fact.³

It had formerly been made a question,⁴ how far an heir of the appellant might have execution against an appellee, when once convicted at the suit of the appellant. There was still a difference of opinion upon this point; some considering it as an ancestral action, of which the heir could not, consistently with the analogy of legal reasoning, be deprived; others again looking on it as a remedy for a personal injury, which *moritur cum personâ*. Upon a doubt, as in a former case, whether a *scire facias* on such a record would lie against the heir for allowing a pardon, a decision on the principal point was avoided, by determining that the pardon might be allowed without it.⁵ The contrary opinions that had been started at different times, on the admitting a defendant to become a provor, after pleading not guilty, were settled upon the following distinction: that on an indictment he might be admitted, after not guilty, and before verdict, but not on an appeal.⁶

An alteration took place in the practice of dealing with prisoners who challenged the number of thirty-six jurors. It was the course in the reign of Edward IV. to put such persons to the penance. The same was done in the third

¹ 3 Hen. VII., 1.

² Ibid., 12.

³ 4 Hen. VII., 18, 110.

⁴ *Vide* vol. iii.

⁵ 9 Hen. VII., 5.

⁶ 11 Hen. VII., 5.

year of this king by consent of all the justices, except Keble, who said this, being an appeal, was not a case within the statute of Westminster,¹ which only speaks of the king's suit.² In the same year it was agreed by the justices of both benches, without any distinction between an appeal and indictment, that a man who challenged thirty-six jurors should be hanged, and not put to the penance; and it was resolved that this should be observed as the practice in their circuits,³ notwithstanding the contrary usage in former reigns. It was at the same time agreed, that those who confessed a felony, or were outlawed or abjured, or became provors, should not make their purgation before the ordinary.

We have before seen what the courts decided respecting sanctuary in cases of treason.⁴ If an offender fled to sanctuary, it was not enough to declare that he came there to save his life, but to add that he had committed felony; though it was not requisite that he should name the special nature of the felony till the coroner came.⁵ If he did not make such a general declaration, he might, without ceremony, be dragged from thence⁶ (a). If he confessed the felony, he would be per-

Sanctuary.

(a) Early in the reign an incident in its legal history occurred, very significant of coming events. It would seem that some questions had been raised as to the privilege of sanctuary at Westminster Abbey, and some complaints made as to its operation in affording shelter to infamous persons; for in the Year-Book of the first year we find that the abbot, with his counsel, Dr. Coke, came into parliament, and showed the privileges of the place, and in conclusion he was advised by the lords spiritual and the judges that it was not wise in him to make his franchises and liberties matter of argument, but that the best way to preserve them was to take care that they should be well and duly kept, and that wrong-doers who were deceivers of the people, by color of these liberties, should be corrected (*Year-Book*, 1 *Hen. VII.*, fol. 10). Early in the next reign this matter came again into question with another closely connected with it — privilege of clergy — and it had in the result a fatal issue for these privileges. In the same year, the very first year of this reign, occurred the case of Humphrey Stafford, in which it should seem that privilege of sanctuary was virtually destroyed in cases of treason, if not of felony. Stafford, attainted of treason, took sanctuary, and was taken therefrom and imprisoned in the Tower, and when brought to the bar of the king's bench, pleaded the privilege. Upon that the question was solemnly discussed before all the judges, and they gave a unanimous judgment that such a privilege could not be prescribed for without an origin in some charter before the time of memory, because treason so exalted itself against the prerogative of the king that it could not be prescribed for *per se*, and they disregarded ancient charters before the time

¹ *Vide* vol. ii., c. x.² *Ibid.*, 12.³ 3 *Hen. VII.*, 12.⁴ 3 *Hen. VII.*, 2.⁵ *Vide ante*.⁶ *Bro. Sanct.*, 11.

mitted to remain there forty days, according to the old law. But what is said above seems to be confined to a

of memory, not allowed within time of memory, and gave judgment that Stafford be executed (*Year-Book*, 1 *Hen. VII.*, fol. 24). It is evident that the principle here laid down was fatal to sanctuary, for in every case it was against the royal prerogative of justice. But this was not all. Next term the Abbot of Abingdon came before the judges, and produced the ancient charter on which his claim of privilege was founded, and the whole matter was gone into in the exchequer chamber, and the judges were advised that they should not determine it without having conference with the prelates, as it chiefly concerned them. But one of the judges at once said, "It seems to me that it would be best for us to confer among ourselves, and to see that we understand it. For it appears to me that the matter principally arises in our law. For there can be no franchise without grant from the king. For the king can grant that any person who enters such a place, having committed treason, shall not be taken therefrom. And this shows that it can be done without the assent of pope or bishop, and that the pope cannot do it within this realm. For to pardon or dispense with treason pertains exclusively to the king. And a place of safety is as a privilege, not as sanctuary. But when the pope has consecrated the place, then it is sanctuary, and not before; and then the pope can give sentence of excommunication or other spiritual penalties against those who infringe upon it. But the principle of protection arises by our law, of which the cognizance belongs to us. And so we know what our law is in the case, and ought not to remit to the prelates." This view was approved of by the judges. It was then proposed that the counsel for the abbot should argue the question before them; but they objected that, as no case was actually before them, it would be irregular and extrajudicial to declare their opinions upon the subject. What regard was paid to the privileges of the church at this period may be shown by a single but significant case from the reports of the reign. At a gaol-delivery at Southwark, before Sir Thomas Frowike, the chief-justice, two were indicted of felony, and they pleaded that they had been taken out of sanctuary by certain persons, and prayed to be restored. They were told by the chief-justice to plead to the felony, but (as is conceived quite rightly) declined to do so; for if they had been taken out of sanctuary, they were not bound to plead, and they might justly decline to plead until it was determined whether or not they were bound to plead. It was found that they had *not* been taken out of sanctuary, and thereupon, without their being called upon to plead in bar, judgment was given that they should suffer the terrible tortures of the *peine forte et dure*, and be slowly crushed or starved to death. The judgment given was, that they be taken to the gaol whence they had come, and that then they should be laid down upon the ground, and that so much weight should be put upon them as they could suffer, *and more*, and that they should have nothing to eat or drink but bread and water; and that so they shall be kept continually until they died — "*et qu'ils essint continuont tanque ils sont morts*" (21 *Hen. VII.*, *Keilway*, 70). That such a judgment could be given according to law would of itself be sufficient to characterize the age as one of cruelty and barbarity; but that such a judgment should have been given against men unnecessarily, and, as it should seem, illegally, at all events, contrary to the intent and spirit of the law, which reserved this terrible penalty for those who culpably and obstinately refused to plead, shows the degraded character of the judges. And finally, that such an arbitrary, cruel, and illegal judgment should have been given against men who had set up a privilege of the church, showed the hostility of the lawyers to the church.

man taking sanctuary in a *church*; for there were two manner of sanctuaries; private, as Westminster Knoll, and the like; and general sanctuaries, as every church. If a man fled to such a sanctuary as the Westminster Knoll, he might remain undisturbed for life; but if he chose to abjure within the forty days, the coroner was to appoint him a day to do it. The law of sanctuary is laid down in a *reading* of this period in the following manner: None shall take sanctuary but *in periculo vitæ*, as for treason, felony, or the like, and not for debt; for a grant or prescription to have sanctuary for debt was against law, and void. But the reading lays down a strange quibble to evade this; for it admits, that if a man's body was in execution, and he escaped, and came to a sanctuary ordained as a refuge and safeguard for a man's life, he should have benefit thereof, *because by long imprisonment his life might be in jeopardy*. If a church was suspended for bloodshed, he who took it as a sanctuary for felony should still enjoy it for forty days. It was held that abjuration for felony discharged all felonies done before the abjuration. A man could not abjure for petty larceny, but only for such felonies as induced the pain of death.¹

It was the opinion of the judges, that if the ordinary would not permit a clerk to make his purgation, the king might command it by writ.²

Henry is celebrated by his historian³ for the many excellent laws he caused to be made (a). He was not less attentive to the regular execution of

The king and
government.

(a) This historian was Lord Bacon, and the statement is not to be relied upon, and is indeed not reconcilable with the truth of legal history, as shown by the irrefragable evidence of the statute-book. The first laws passed in Henry's reign as to fines and uses, were simply in pursuance of laws passed by his predecessor, whom Bacon is obliged to acknowledge was a good law-maker (*Hist. Hen. VII.*, fol. 2). Although, following Lord Bacon, Hume and other historians have lauded the king for a far-reaching and sagacious policy in framing the statute of fines, so as to allow of alienations of estates-tail, and thus to destroy the power of the nobility, it is a simple fact that, so far from its having been intended to have such an effect, it appears to have been a doubtful point whether it had the effect of barring an estate-tail. Hume points out that this was the era of arbitrary power. "The power of the kings of England had always been somewhat irregular and discretionary, but was scarcely ever so absolute during any former reign, at least after the

¹ New Cases, 79.

² 15 Hen. VII., 9.

³ Lord Bacon.

his laws when made. In the first year of his reign, at the close of the parliament, he devised an oath, binding

establishment of the Great Charter, as during that of Henry. Besides the advantage derived from the personal character of the man, he came to the throne after long and bloody civil wars, which destroyed all the great nobility, who alone could resist the encroachments of his authority. The people were tired with discord and intestine convulsions, and willing to submit to usurpations, and even to injuries, rather than plunge themselves anew into like miseries. The fruitless efforts made against him served always to confirm his authority. As he ruled by a faction, and the lesser faction, all those on whom he conferred offices, sensible that they owed everything to his protection, were willing to support his power, though at the expense of justice and national privileges. These were the chief causes which, at this time, bestowed on the crown so considerable an addition of prerogative, and rendered the present reign a kind of epoch in the English constitution" (*Hist. Eng.*, vol. iii., c. xxvi.). The particular object to which this king turned his arbitrary power was the amassing of treasure by the use or abuse of laws. The whole system of the feudal law which still prevailed was turned into a scheme of oppression. But the chief means of oppression employed by these ministers were the penal statutes, which were rigidly put into execution against all men. Informers and inquisitors were encouraged, and no difference was made whether the statutes were beneficial or hurtful. The sole end of the king and his ministers was to amass money, and bring every one under the lash of their authority, (*Hist. Eng.*, vol. iii., c. lxi.). There was, it will be observed, no illegality in all their acts, and nothing contrary to the *letter* of the law, however contrary to its spirit. The laws were put in force in a harsh and oppressive manner, but still they were put in force; and the law itself was used for purposes of oppression. Indeed, one great lesson of the reign is, how far law may be so perverted and abused without absolute illegality. Lord Bacon, quoted by Hume, thus describes how martial law was exercised in this reign: "The king made a progress into the northern parts, where a strict inquiry was made after those who had assisted and favored the rebels. The punishments were not all sanguinary. The king made his revenge subservient to his avarice. Heavy fines were levied upon the delinquents. The proceedings of the courts, and even the courts themselves, were arbitrary. Either the criminals were tried by commissioners appointed for that purpose, or they suffered punishment by a sentence of court-martial" (*Hist. Eng.*, vol. iii., c. xxv., fol. 291). It appears that the historian did not conceive this to have been illegal, for in a note he points out that the office of constable was not limited to times of war, and so was in direct contravention of Magna Charta (Note H, p. 290). But it has always been a doctrine of our law, that rebellion is war. Constitutional law, however, was still in a rude and undeveloped state. The characteristic of this long period, however, was transition, and gradual change from the ancient system to the germs, at least, of the modern. There was nothing in which this transition was more remarkable than in respect to those two great incidents of the middle ages, — villenage, and the feudal system, with its oppressive features of wardships and marriages. As regards villenage, it has been seen that, by the ancient law, if the lord granted the villein any estate, even for a year, or recognized him as having any of the rights of a freeman, the villein was *pro facto* emancipated; and numerous cases in the Year-Books illustrate this. It has also been seen, that in the reign of Edward IV. judicial decisions had secured the legal estates of the copyholders, the representatives of the better order of the villeins. During the period on which we are now entering, the gradual process of emancipation went on very

all persons who took it to observe the execution of several statutes. We are told, that not only those of the house-

rapidly, and villenage became obsolete and extinct amongst those who were formerly accustomed to receive it. A commutation was accordingly made, in rents for services, and in money-rents for those in kind; and as men discovered that their farms were better cultivated when the farmer enjoyed a security in his possession, the practice of granting leases to the peasant began to prevail, which entirely broke the bonds of servitude, already much relaxed from the former practice. After this manner villenage went gradually into disuse. The interest of the master, as well as that of the slave, concurred in this alteration. The latest laws which we find in England for enforcing or regulating this species of servitude, were enacted in the reign of Henry VII. And although the ancient statutes on the subject remained unrepealed by parliament, it appears that before the end of Elizabeth the distinction of villeins and freemen was totally, though insensibly, abolished, and that no person remained in the state to which the former laws could be applied (*Hist. Eng.*, vol. iii., c. xxiii.). Thus, says the historian, personal freedom became general, which paved the way for political or civil liberty (*Ibid.*). It prepared the way for it, but the process itself was slow, and occupied the whole period of a century, the entire duration of a dynasty; but it commenced with the reign of Henry VII., and there are no two features of that reign more remarkable than, on the one hand, the tendency to diminish the power of the feudal nobility, and, on the other hand, to elevate and emancipate the villeins. The latter object was left to the gradual process of change, arising from the altered usages of the age. The former object was attained by the measures which the ascendancy of the crown enabled it to pass, for dispersing those bands of retainers which formed the strength of the nobility. Hume observes, upon the stringency of the measures passed in the reign of Henry VII. against the practice of having retainers, "The Star Chamber exercised an arbitrary power of fining and imprisoning juries who acquitted prisoners in state trials. And indeed there scarcely occurs an instance during all these reigns that the sovereign or his ministers were ever disappointed in the issue of a prosecution. Timid juries, and judges who held their offices during pleasure, never failed to second all the views of the crown. And as the practice was anciently common of fining, imprisoning, or otherwise punishing the jurors, merely at the discretion of the court, for finding a verdict contrary to the direction of these dependent judges, it is obvious that juries were then no manner of security to the liberty of the subject" (*Ibid.*). Well might the historian observe that the government of England during that age bore, in this respect, some resemblance to that of Turkey — that the sovereign possessed every power except that of imposing taxes (*Ibid.*). One great feature of the legal history of the reign is the sanction given by statute to the arbitrary jurisdiction of the Star Chamber, which, although by the statute, as Lord Bacon says, pointed at the suppression of force and violence, such as disturbed the peace of the kingdom, was afterwards made, by the subsequent sovereigns of the dynasty, a fearful and formidable engine of arbitrary power. The jurisdiction of the king's council no doubt had existed in former reigns, and ever since the Conquest, but it had never been exercised and developed as it was in this and the subsequent reigns. Even in this reign it appears to have commenced its arbitrary proceedings, for we find in the "Treatise on the Star Chamber" that a member of parliament was summoned before it and directed to appear *de die in diem*. And, as our author observes, it became the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign, as may be seen in the history of the princes of the house of Tudor, who owed the

hold, but those of the House of Commons, came before the king and lords, and took this oath. After these, the

maintenance of their high prerogatives principally to the aid of this tribunal. This, then, was the epoch of arbitrary power. Throughout the history of this dynasty an entire identity of principle and policy will be observed. Thus, in the reign of Elizabeth we find Lord Burleigh recommending to the queen that she should erect a court for the correction of all abuses, and should confer on the commissioners a general inquisitorial power over the whole kingdom; and he set before her the example of her own grandfather, Henry VII., who by such methods extremely augmented his revenue; and he proposed that the new court should proceed as well by the direction and ordinary course of the laws as by virtue of her supreme and absolute power for whatever law provided (*Hume's Hist.*, vol. v., App. 3). So the same minister proposed the resumption of the system of benevolences or forced loans adopted by Henry VII. and Henry VIII., although acknowledged to be illegal (*Ibid.*). Thus the character of this reign was that of the dynasty; and it was unmistakably the era of arbitrary power, which extended throughout its duration. So, again, that power of exercising martial law, which had been first set up as a kind of permanent means of civil government under Edward IV., was exercised all through these reigns, at the pleasure of the sovereign, in time of peace, and after the suppression of rebellion. It was exercised at pleasure by Henry VII. and Henry VIII. The parliament in the reign of Edward VI. acknowledged the jurisdiction of the marshal's court to be part of the law of the land (7 *Edw. VI.*, c. xx.), and martial law was exercised with the utmost severity in the reign of Elizabeth, not only after any rebellion, but even on occasions of mere civil commotion or disturbance. Nor was there indeed much difference between trial by court-martial and by the ordinary civil tribunals; for while so many terrors hung over the people, no jury durst have acquitted a man when the court was resolved to have him condemned (*Hume*, vol. v., App. 3). "The king's ministers," says Bacon, "were privy counsellors, and lawyers, who turned law and justice into wormwood and rapine" (*Hist. Hen. VII.*). "The means of exaction," says Sir James Mackintosh, "chiefly consisted in the fines incurred by slumbering laws, in commuting for money penalties which fell on unknowing offences, and in the sale of pardons and amnesties. No man could be sure that he had not incurred mulcts or other grievous penalties by some of those numerous laws which had so fallen into disuse, by their peculiar and vexatious nature, as to strike before they warned" (*Hist. Eng.*, vol. xi., c. iii.). Thus the law was used as an engine of oppression and a weapon of rapine; and it was seen how powerless are the mere forms of law when not protected by the spirit of independence, the guarantees of law, and the reality of justice. Our author observes that Henry VIII., through the whole of his reign, enjoyed the full gratification of his absolute will and caprice, and that a concurrence of events enabled him, beyond the example of any of his predecessors, to tyrannize over all ranks of men, and even over the laws themselves, or to cause such laws to be made as would warrant every act of power, and that he established an absolute dominion over law and justice (c. xxx.). But that was only carrying out the policy of his father, who boasted that he governed the law by means of his lawyers, and who was enabled to do this by the absolute power established by Edward VI. Mr. Hallam very truly says of the reign of Edward VI. that it was a reign of terror (*Hist. of the Middle Ages*); and there can be no difficulty in tracing its continuance through the reigns of the Tudor dynasty, or the identity of the means by which it was established. A glance, for instance, at the precedents of indictments for treason in those reigns and that of Edward IV. will serve

peers, both spiritual and temporal, were asked by the chancellor, whether they were willing to take the oath ;

to illustrate this very strongly. (They are to be seen in *Pyne's case*, *Cro. Car.*, 189.) The policy of this reign was in pursuance of that of Edward IV., and it was pursued still more ruthlessly in the next. Except part of the statutes as to privilege of clergy, it would be difficult to discover any legislation of this reign at all entitled to be called original. There is some truth in another statement of the author, that the king was attentive to the execution of the laws. This was the king's own description and idea of his policy, for, on the occasion alluded to by our author, he said that there were plenty of excellent laws, and that all that was necessary was their due execution. This, indeed, was the distinguishing feature of the era — a rigid execution of the laws. But it did not commence in his reign. In the reign of Edward IV., this execution of the laws is to be observed, and the statutes of liveries, for instance, were enforced. The statutes of liveries themselves were passed in previous reigns ; and though several were passed in the present reign, they were only by way of addition, extension, or explanation. They had been of little effect, because they had not been put in execution ; and the great change which characterized this era was, that the laws were henceforth executed. The movement for that object had commenced in the reign of Edward IV., and it was continued in the present reign. There was, indeed, one great matter in which this reign was distinguished in that respect, and that was in the sanction given by statute to the arbitrary jurisdiction of the Star Chamber, the effect of which was most powerful in compelling a due execution of the laws, by holding its terrors over those whose duty it was, either as magistrates or jurors, to execute the laws. Nor was it only under martial law that men found the law no protection to their lives ; the ordinary tribunals, in the absence of any guarantee by the power of parliament, were equally servile, and men, not only, as Bacon says, of the meaner sort, but of the noblest rank, were liable to be summarily convicted and executed without legal cause — as for the mere speaking of vague words reflecting on the king, or on his title. Thus it was that Stanley was executed, just as Buckingham was executed in the next reign, for mere words, which the judges deemed, as Bacon states, afforded no evidence of any treasonable intent (*Hist. Hen. VII.*, fol. 77). The effect of such executions, as Lord Bacon tell us, was to produce great terror among all the king's subjects, insomuch as no man thought himself secure (*Ibid.*, 79). Thus, in short, the sanguinary and arbitrary policy of the king established a reign of terror. The same policy was pursued by his successor ; the same reign of terror pervaded the whole history of the dynasty. The worst part in the jurisdiction of the Star Chamber was its interference with juries, who were liable, even in criminal cases, to arbitrary fine and imprisonment if they gave verdicts against the crown. This more than anything else tended to make the crown absolute. In an age when juries themselves were tampered with and coerced, even trial by jury failed as a protection to the oppressed. "Juries themselves," says Hume, "when summoned, proved but small security to the subject, being browbeaten by the oppressors, nay, fined, imprisoned, and punished, if they gave sentence against the inclination of the ministers" (*Hist. Eng.*, vol. iii., c. xxvi.). "They imprisoned and fined juries who hesitated to lend their aid when it was convenient to seek it" (*Mack. Hist. Eng.*, vol. xii., c. iii.). "It was often more prudent to compound by money, even under false accusations, than to brave the rapacity and resentment of the king and his tools." (*Ibid.*) The author recognized that the pursuit of arbitrary power was the policy of the dynasty ; that the spirit and policy of all the six reigns of this dynasty were the same is shown in the most simple yet striking manner by the fact that, for the most part,

who all answering that they were ready, it was read to them; and every lord spiritual laying his right hand on his breast, and every temporal lord on the book of gospels, swore to observe and perform the same. The substance of the oath was—not to harbor felons; not to retain any one by indenture or oath, contrary to the statutes of liveries; not to encourage maintenance, nor embracery, nor riots, nor unlawful assemblies; not to prevent the execution of the king's writs; nor let to bail or mainprise any felons.¹

A precaution like this at once shows the king's solicitude for the due execution of justice, and the protection it needed in times when great men, instead of promoting, had been more used to defeat, the effects of it by force and cabal.

It is said that Henry, being entertained at the Earl of Oxford's with great state, at his departure expressed astonishment at the number of servants in liveries and badges he saw waiting; but being informed by his host that they were his retainers come to do him honor, he told him he would not have his laws broke before his face, and that his attorney must speak with him. It is said the earl paid 15,000 marks as a composition for this offence. In every transaction of this king there is a regard shown by him to the laws. Though no prince was more jealous of his prerogative, or took greater pains to gratify his love of money, than Henry, yet in all instances where these two grand interests were concerned, he still proceeded under the sanction of law.

their ministers *were the same*. The Marquis of Winchester, as Sir J. Mackintosh remarks, who had served Henry VII., retained office under every intermediate government, until he died in office under Elizabeth, having been the principal promoter in the council of the persecutions of the Protestants under Mary. (*Mack.*, vol. iii., c. vi.; *Fox*, vol. iii., 308; *Strype*, vol. iii., 217; *Burnet*, vol. ii., *Rec.*, 2851; *Lingard*, vol. v., c. vi.) Herbert, whom Henry VIII. enriched by a grant of the monastery of Wilton, and ennobled by the title of Earl of Pembroke, had with open arms devoted himself to every sovereign, received the nuns at Wilton, cap in hand, when they were restored by Mary, and drove them out with a horsewhip when again suppressed under Elizabeth (*Mack.*, vol. iii., c. vi.). Sir William Petre was secretary of state under Henry VIII. and his three children, giving an equal support to the persecutions of the Catholics by Protestant sovereigns, or of Protestants by Catholic sovereigns. The ministers of Henry VII. were retained by Henry VIII., and their successors were men of the same stamp, and pursued the same policy—a policy of absolute, inexorable tyranny.

¹ *Parl. Hist.*, vol. ii., 419.

In the seventh year of his reign he revived *benevolences*, invented first by Edward IV.; but, more wary than that prince, he did it by consent of parliament, and raised great sums in that way. He strictly enforced all penal statutes which would contribute anything towards his exchequer; with the same view he caused prosecutions to be instituted on many old and forgotten laws. These legal oppressions, if they may be so called, were carried to a great height in the latter part of his reign, which rendered him extremely unpopular, if not odious (a); and subjected

(a) Empson, it appears, was a lawyer, for in *Dyer's Reports*, in the sixth year of Henry VIII., there is this curious case:—"Empson avowed for a rent-charge granted to him by a stranger, *pro consilio impendendo*; plea in bar that the avowant, Empson, was attainted of treason, and committed to the Tower; and grantor had need of counsel, and could not get access to him. On demurrer to this plea, Empson, the avowant, had judgment; for that the rent could not be forfeited; also, that being in prison, he could give counsel as well as if at large, and no default was assigned in him" (*Dyer's Reports*, fol. 2). Lord Bacon says:—"And it may justly be suspected that as the king did excel in good commonwealth laws, so nevertheless he had in secret a design to make use of them as well for collecting of treasure as for correcting of manners" (87). "And somewhat towards the end of the reign," continues the historian, "he had gotten for his purpose two instruments, Empson and Dudley, who, being lawyers in science, and privy councillors in authority, turned law and justice into wormwood and rapine. For, first, their manner was to cause divers subjects to be indicted of certain crimes, and so set forth to proceed in form of law, but when the bills were found, then presently to commit them. And, nevertheless, not to produce them in any reasonable time to their answer, but to suffer them to languish long in prison, and by sundry artificial terrors to extort from them great fines and ransoms, which they termed compositions and mitigations. Neither did they (towards the end) observe so much as the half-face of justice in proceeding by indictment, but sent forth their precepts to attach men, and convene them before themselves and some others at their private houses, as a court of commission; and there used to shuffle up a summary proceeding by examination, without trial of jury, assuming to themselves there to deal both in pleas of the crown and controversies civil. Then did they also use to enthrall and charge the subjects' lands with tenures *in capite* by finding false offices, and thereby to work upon them for wardships, liveries, former services, and alienations (being the first-fruits of those tenures), refusing, upon divers pretexts and delays, to admit men to traverse those offices, according to the law. Nay, the king's wards, after they had attained their full age, could not be suffered to have livery of their lands without paying excessive fines, far exceeding all reasonable rates. They did also vex men with informations of intrusions upon scarce colorable titles. When men were outlawed in formal actions, they would not permit them to purchase their charters of pardon except they paid great and intolerable sums, standing upon the strict point of law, which, upon outlawries, gives forfeiture of goods. Nay, contrary to all law and color, they maintained the king ought to have the half of men's lands and goods, during the space of full two years, for a penalty in case of outlawry. They would also ruffle with juries, and enforce them to find as they would direct, and, if they did

his two agents in those prosecutions, Empson and Dudley, to a severe account in the subsequent reign.

The new-modelling of the Star Chamber fell in with Henry's whole plan. It at once served to secure his prerogative, by enforcing among all ranks of people a strict obedience to the laws; and became a source from whence he was always deriving pecuniary supplies. The penalties in that court used to run very high. It is related, that Sir William Capel, an alderman of London, was fined in £2743—an immense sum in those days!—and he was obliged to compound for £1615. This is mentioned only as one instance of these proceedings. Where criminal prosecutions did not produce fines, the king used to make them turn to account, by remitting corporal pains for pecuniary compensations to be paid to himself.

Notwithstanding the bad use sometimes made of severe laws, it cannot be denied that the temper and designs of Henry contributed to establish the laws in their full force,

not, convene them, imprison them, and fine them. These and many other courses they had of preying upon the people. But their principal working was upon the penal laws, wherein they spared none, great nor small, nor considered whether the laws were possible or impossible, in use or obsolete; but raked over all old and new statutes, though many of them were made with intention rather of terror than of rigor, having ever a rabble of promoters, questmongers, and lending jurors at their command, so that they could have anything found either in fact or valuation." In the first year of the next reign a case occurred which illustrated their way of proceeding. It was a writ of *monstrance de droit* (analogous to a petition of rights), presented against an office found for the king in this reign under Empson. It stated that it was found before the escheator that one Oldale, knight, was attainted of high treason in the 31st of Henry VI., and that at the time of the attainder he was seized of a manor, by virtue of which the late king (i. e., Henry VI.) was seized of the manor, and by his letters-patent granted it to Jasper, Count of Pembroke, in fee; and that after his death the king, Henry VII., had it, and that it descended to Henry VIII., as his son and heir; and that Sir W. Capel had intruded upon the manor. To this Coningsby and Mallow pleaded by way of *monstrance de droit*—that is, showing their right, and stated that, although it was true that Sir W. Oldale had been attainted of treason, he was by another act restored, and it was enacted that he should re-enter into the manor, and that he had done so, and died, and that his cousin and heir entered and was seized. Upon which Jasper, by color of the king's grant, entered, but that afterwards he re-entered, and conveyed to Coningsby and Mallow. The case was argued at great length, and the chancellor, without the advice of any judge, and without aid from the counsel of the king, gave judgment that a writ of *amoveas manus* should issue—that is, that the king should withdraw from possession. Upon which, Keilway says, *et hoc contra legem ut dicitur*; but it was said that he did it, for that the office was found by the artifice (per le faux subtiltie) of Sir Richard Empson and Dudley in the time of the other king, "*les quez fueront ses hauts et cruel approvers*" (Keilway, fol. 159).

and to render the administration of justice more regular and effectual. While this had a good influence on the order and peace of society, it levelled all ranks of men under the same submission to lawful authority. The executive magistrate, in the person of Henry, increased in power and distinction; while the nobility sunk below the relative importance they had formerly enjoyed; and the commons continued still in their original imbecility: so that the prerogative of the crown had in this reign an opportunity of aggrandizing itself to a degree much exceeding what it had been in earlier times, though not equal to what it became in the succeeding princes of the line of Tudor.

There are no state trials in this reign now extant; and of these occurrences the chroniclers of the time give very unsatisfactory accounts. It is very uncertain what was the charge against Sir William Stanley, who was executed for a conspiracy, as it is related, against the king.

The method introduced by Richard III. of attainting persons by bill, was pursued by Henry VII., and became henceforward not unfrequently resorted to, where it was thought the common law could not effectually reach an offender.

The legal monuments of this reign are the statutes, judicial records, and reports. The statutes underwent no further alteration in the manner of forming them in parliament. The records are from this period, almost in a regular series, kept with order, and in good preservation; as may be seen in the repositories of the Courts of King's Bench and Common Pleas, in Westminster Hall. The reports are the Year-Book, with some cases in the collectors Jenkins and Benloe; but more particularly in Keilway, who lived at this time, and took them himself. The Year-Book of this reign, as it goes more into points of law, and such matters of learning as have survived the times when they were debated, is more deserving attention than the preceding. We find the counsel and judges sometimes quoting cases; and Bracton is once or twice referred to;¹ but this was not common: their determinations were mostly the result of argument and discussion, and these were made precedents for future ages.

¹ 1 Hen. VII., 6 b.

There are no law treatises of this reign in print. But there is a famous book, said to be still in manuscript, written by Marrow, on the office of a justice of peace: a work which has been quoted by later writers, such as Fitzherbert and Lambard, with great commendation, and seems to have been followed by them on the same subject. Though this reign was so barren in original works, they were not backward in putting to the press the productions of former times.

The art of printing began to give further assistance to the study of the law than it had in the former period. Caxton went off the stage in 1491: we hear no more of Lettou and Machlinia. Wynkyn de Worde took the lead till 1497; when Richard Pynson entered into competition with him, as did Julian Notary in 1498, William Faques in 1504, and afterwards Henry Pepwell; though the career of the last three did not extend much beyond the present reign, as did that of Pynson and De Worde. Faques, and afterwards Pynson, had attained a distinction which Wynkyn de Worde seems never to have enjoyed; they were successively (and as some think jointly) king's printers. But this appointment seems to have conferred no exclusive right of printing law-books, for the statutes continued to be printed by Wynkyn de Worde and other printers: this appointment is thought not to have been by patent, but by sign-manual.

The several statutes passed in this reign were printed soon after they came out by De Worde, by Pynson, and by Faques; and some were repeatedly reprinted by all of them. We have before intimated, that some statutes ascribed to Caxton most probably belonged to a later period, and may perhaps have been printed in this reign. There appears a collection of the statutes, under the title of *Nova Statuta*, beginning with 1 Edward III. and ending with 12 Henry VII. This is printed by Pynson, and is ascribed to the year 1497, just after the close of that parliament: it is, however, certain that it was printed before 19 Henry VII., as it would otherwise have contained the statutes of that session.¹

It is remarkable that the latest and most accurate inquirers into our typographical antiquities do not precisely

¹ Typog. Antiq., 141, 144, 204, 205, 218, 283.

fix the printing of any Year-Book to the reign of this king. We have before taken upon us to say, that certain years of Henry VI. were printed about the years 1480 and 1483. A writer¹ of some learning, but famous for misrepresentation, has advanced that Wynkyn de Worde was the first who began to print the Year-Books; and that he and Pynson printed above forty of them, which were to be found among the *libri manuscripti* in Lincoln's Inn Library; but upon search, none such have been found. Mr. Ames, a more faithful inquirer, informs us, that he never met with any Year-Book bearing the name of Wynkyn de Worde, either alone or in conjunction with Pynson; but that he had seen two, being 17 and 18 Edward III., without a printer's name or date, which he thought were printed with the same type as Fitzherbert's Abridgment, in 1516; and which he makes no question were printed by De Worde in the subsequent reign. It is agreed that Pynson printed many Year-Books; but it is still left to the probability of the thing, whether he, any more than De Worde, printed any during this reign.² It seems most probable that twenty-four years would not be suffered to pass without some addition being made to the stock of Year-Books, which we have before seen were printed in the time of Edward IV. or Richard III. In general, the time of printing the Year-Books seems to be less ascertained than that of most other of our early printed books, owing to their being mostly printed without a date.

Whatever doubt there may be about the time of printing our books of common law, there seems none about those of the ecclesiastical law. The edition of Lyndwode's Provinciale, before mentioned,³ is ascribed to Wynkyn de Worde, and is thought to have been printed in 1496. The great demand for this authentic canonist requiring a further supply, the same printer gave another edition in 1499, in octavo; and we find two others in 1505;⁴ one of them at Paris, supposed to be printed from an impression made at Oxford.

We find another increase in the judges' salaries. Sir William Hussey, appointed Chief-Justice of the Court of King's Bench in the 1 Henry VII.,^{Miscellaneous facts.} had the yearly fee of one hundred and forty marks granted

¹ Psalmanazar.

² Typog. Antiq., 235.

³ *Vide ante.*

⁴ Typog. Antiq., 125, 135, 312.

to him for his better support: further, he had one hundred and six shillings and eleven-pence farthing and the sixth part of a halfpenny (such is the accuracy of our author and the strangeness of the sum) for his winter robes, and sixty-six shillings and sixpence for his robe at Whitsuntide.¹

An act of the Irish parliament made in this reign, as it communicated to that kingdom a participation of our laws in a more full manner than it before enjoyed them, may be considered as an interesting fact in the history of the English law. Amongst other statutes made under the government of Sir Edward Poynings, in 10 Henry VII., and therefore called Poynings' laws, there is one which enacts² that all acts of parliament made in England before that period shall be in force within the realm of Ireland. The extending of the dominion of the English law by an act of that legislature, contributed to connect these two kingdoms in the strictest bonds of union; that of similar laws, and a similar constitution; the grounds and great outlines of which it was thought would ever be preserved alike in both by the appeal which had long been made from the courts of that country to the courts here, notwithstanding the differences that must by degrees arise from the regulations of a distinct parliament providing for the exigencies of a distinct people.

There was another provision of the Irish parliament, which seemed to promise that the law of that country would not be permitted to deviate from the model communicated by the parent state. An act had been made by chap. 4 of the same statute to the following effect: "That before a parliament be summoned or holden, the chief governor of Ireland should certify to the king, under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts to be proposed therein: That after the king in his English council should have considered, approved, and altered the said acts, and certified them back under the great seal of England, and given license to summon and hold a parliament, then the same might be summoned and held; and therein the acts so certified, and no other, should be proposed and received, or rejected." This mode underwent further alteration in after-times.

¹ Dugd. Orig., 110.

² Chap. 22, Irish Statutes.

CHAPTER XXVIII.

HENRY VIII.

OF JUDICATURE IN WALES — AND IN COUNTIES PALATINE — OF PARLIAMENT — OF THE ECCLESIASTICAL POLITY — FEES OF ORDINARIES — RESIDENCE AND PLURALITIES — SUBMISSION OF THE CLERGY — PAPAL AUTHORITY ABOLISHED — MARRIAGE — TITHES — OF PRECEDENTS — THE POOR LAWS — OF TRADE — TERMS FOR YEARS — LEASES OF TENANT IN TAIL — GIFTS TO SUPERSTITIOUS USES — DEVISE OF LAND — STATUTE OF USES — JOINTURES — STATUTE OF WILLS — STATUTE OF BANKRUPTS — COURT OF WARDS AND LIVERIES ERECTED — OUTLAWRY — JURORS' ATTAINT — STATUTE OF JEOPAIL — STATUTE OF LIMITATIONS — TRINITY TERM ALTERED.

THE modifications made in our law during the reign of Henry VIII. attract our attention in a particular manner. The spirit of reformation which began to prevail at this time, was not confined to our religious worship; it spread to the ecclesiastical judicature, it reached the law of property, and the administration of civil and criminal justice (*a*). In every regulation of a juridical nature made

(*a*) This is as inaccurate as the account given in this chapter of the most important of these changes. It would convey the impression that there had been some legislation in the reign, with the object of "reformation in religion," and that the spirit of this legislation had extended itself to those other subjects which are mentioned, ending with the administration of justice. This would be an impression in every respect the reverse of the truth. There was no legislation in this reign in any respect directed by a spirit of reformation in religion, nor was there any alteration in the law as to religion (although there were enacted at the dictation of the king some sanguinary edicts for its support); and although there was legislation as to the spiritual supremacy over the established church, which afterwards led to great changes in the law as to religion, it was not intended to have any such result, and was dictated not at all by a spirit of reformation, but by a spirit of royal tyranny on the part of the king, and slavish servility on the part of the parliament. And although it led indirectly in this reign to important changes in the law, this did not take place as here represented; and some of those which are mentioned lastly — as to the administration of justice, for instance — instead of being, as would be supposed from the above statement, the latest results, were rather the precursors of the great measure which signalized the reign. It would, again, be an erroneous error to imagine that the more important measures of this reign were dictated by any "spirit of reformation" at all. They were rather the results of royal absolutism. The author himself observes that they showed "the marks of a decisive hand."

in this reign, we perceive a decisive hand. The parliament seemed determined at once to resolve all doubts, and

Of this there can be no doubt, and as little that the "decisive hand" was that of the king, and that these measures were the dictates of arbitrary power, not the deliberate results of legislative wisdom. The author himself observes, somewhat further on in the chapter, that "the attack upon the papal authority, and the reformation of abuses among the clergy, was carried on by fits, as the king's humor directed him," which is quite true (though there is another error there, in reversing the order of these classes of measures); and it will be found that all the more important measures of the reign were a development and advancement of the royal authority, and that other measures of the reign were either the indirect results of these decisive measures, or were dictated by the same spirit and the same policy. The great event in the legal history of this reign, distinguishing it above any other in our annals, was the abolition by statute of the papal supremacy in this country, and the substitution for it of the supremacy of the crown. This, and the measures incident to it, either as leading up to it, or as resulting from it, determined, directly or indirectly, the whole character and tendency of the law and legislation, not only of this reign, but of ensuing reigns, and has never to this moment ceased to have its influence upon our institutions. It would naturally, therefore, be deemed of the most importance to trace the causes, and determine the true nature of this great measure, and likewise to trace the influence of this and its attendant measures upon the character of our future law. It cannot be considered that our author had dealt satisfactorily with this great subject. It demanded some review of the previous law upon the subject, so as to show how far the measure was new, and whether, in short, it was a revolution or a restitution. It demanded for this purpose, and also to understand its real nature, a comparison with the law as previously existing, with reference to the ecclesiastical or spiritual supremacy recognized by law. And it required, further, a careful review of the measures, if any, more or less bearing upon the subject which had been previously passed, or the steps which had been previously taken, in this or in the preceding reigns, in the same direction, and so as thus to trace its real origin and display its true nature and character. Lastly, it required some consideration of the construction put upon the measure, and the view taken of its effect and operation by the crown, by the parliament, and by the courts of law. All this would necessarily require a considerable space, but the author has allotted to it a somewhat smaller portion of his history than that which he allotted to the legislation respecting Wales. It required also, above all, a careful adherence to the historical method, and the order of time, in stating the substance of the series of statutes passed during this reign upon this or kindred subjects. And the author himself had proposed this plan to himself, for he said, "The attack upon the papal authority was carried on by fits, as the king's humor directed him, and they fill on that account a multiplicity of statutes. To arrange these in some order, and to preserve at the same time a kind of history of this famous revolution in the church, will be attended with difficulty; . . . we shall therefore take a view of these statutes as nearly in the order in which they were made as the subject will permit, and this will form a kind of juridical narrative of the Reformation" (*vide* c. xxviii., 303). But the author, so far from carrying out this plan (although to some extent he pursued it), had altogether omitted in this juridical narrative the statutes as to privilege of sanctuary and privilege of clergy, which formed the earliest steps in the great movement against the church, and had postponed them to a future chapter, as though they had followed, instead of preceded, the greater measures; and he had in the same way treated of the

to root out all difficulties, which on former occasions they had been content to soften and palliate according to the

suppression of chantries at a later portion of this chapter, although it preceded the greater measures; and he had barely mentioned the measures for the dissolution of religious houses, which had followed the abolition of the papal supremacy, and to which it is manifest that measure was deemed a necessary preliminary, although the abolition of those establishments led indirectly to some of the most important legislation in this and subsequent reigns. To understand either the true nature of the measure, on the one hand, or its real results on our law and legislation, on the other, it is necessary to adhere to the historic method, and to review all these statutes in the order of time—the order in which they were actually enacted, according to the views then entertained of their nature and necessity, with reference to future measures contemplated. It is necessary also, in order to determine the true nature of the measure, to understand distinctly what *was* the papal supremacy as exercised in this country, and the extent to which, if at all, it was recognized by law; and also what was the nature and extent of the royal power or prerogative with reference to matters spiritual or ecclesiastical. And accordingly this was the course and method pursued by Lord Coke in his elaborate exposition of the law on the subject—a strictly historic method, consisting of a review of all the previous statutes or decisions on the subject. It is manifest that thus, and thus only, can the measure be understood, that is, first, by seeing what the law was, and had been understood to be on these subjects, down to the beginning of the present reign; and, next, by seeing what was the course and order of legislation or judicial decision on these subjects during the present reign, so as to see the relation of each to the other, and show, by their sequence and succession, their real character. To understand a measure abolishing the papal supremacy, it is surely necessary to see what that supremacy was, as recognized by previous law. And to understand a measure establishing a royal supremacy, it is necessary to see whether there ever had been such a supremacy, and, if so, what it was; and, if not, what it was to be when established; and whether or not it was, as it is conceived it clearly was, an establishment in the crown of a spiritual supremacy, such as had been exercised by the pope, and the institution of the royal for the papal supremacy. Lord Coke labored hard, in an elaborate “*Essay of the King’s Ecclesiastical Law*,” prefixed to the fifth part of his Reports, to prove that the prerogative of the royal supremacy—*i. e.*, spiritual supremacy—was by the common law; and he put his meaning beyond a doubt, for he declared his view of the law thus: That the monarchy was absolute, that the king’s sovereignty extended both to clergy and laity, and that his temporal jurisdiction was exercised by the courts of common law; and his spiritual jurisdiction—namely, as to heresy, schism, celebrations of divine service, etc.—was to be exercised by his ecclesiastical courts, according to his ecclesiastical law—*i. e.*, such law as he should approve and allow (5 *Coke’s Rep.*, p. 9). That is to say, Lord Coke contended that the sovereignty was absolute, and that, being absolute, it included, not only temporal jurisdiction over all classes of his subjects, clergy or laity, but that it also embraced a supreme and absolute spiritual jurisdiction. It is to be observed that he based this doctrine upon the assumption that the monarchy was absolute; and as it clearly was not, so his whole argument, for that reason alone, would fall to the ground. And it is further observable that, in point of fact, the assertion of the supremacy was always associated with the idea of an absolute monarchy, that it was so asserted all through the period of this dynasty, that on that very account it led to the Rebellion, and that after the Rebellion it was virtually

exigency of the present moment. Instead of continuing still to ascertain the boundary between the civil and

destroyed, and the royal supremacy merged in a parliamentary supremacy — a very different thing, indeed, and only resembling the royal supremacy in this, that it was a lay supremacy, and involved the entire ascendancy of the laity, but being exercised by parliament, it embodied the national will, and was based on the common consent of the nation. For the present, however, we are concerned with Lord Coke's theory of a spiritual supremacy of the crown at common law, which he sought to make out by a great parade of apparent authorities, all of which, however, so far as they are authentic, will be found to resolve themselves into a temporary supremacy of the crown — that is, its sovereignty — although, no doubt, that was exercised over various matters of a mixed nature when temporality was annexed to spirituality, as in cases of patronage and the like; therefore, on the other hand, the law allowed ecclesiastical jurisdiction, and the exercise of the appellate jurisdiction of Rome, in some matters of a mixed nature, as, for instance, matters testamentary; and the Year-Books of Richard III. and Henry VII. record instances of such appellate jurisdiction recognized in our courts of law (*Vide ante*). But it is obvious that none of these cases touch the question, which is one of a *spiritual* supremacy — as, for instance, excommunication, or spiritual censures, dispensation with spiritual disabilities, or definitions of spiritual offences, as heresy or schism. Now, Lord Coke's references to supposed authorities, when they are at all relevant to that question, are wholly unreliable, and when they are authentic, are entirely irrelevant. Thus, for instance, as to excommunication, he professes to cite a judgment of the reign of Edward I., that a subject who brought a bull of excommunication against another subject should be hanged — a most astounding judgment, had it ever been delivered; but it turns out to have been a mere story, told in the course of a case in the reign of Edward III., to the effect that Edward I., being very much enraged at such a bull being brought against one of his ministers, threatened to have the party hanged — a very different thing; so that the pretended judgment is reduced to an idle story of a tyrant's threat. Further on, Lord Coke cites from an abridgment an authority of the time of Edward III. to show that an excommunication of the archbishop, though disannulled by the pope or the papal legate, was to be allowed, and that the judges ought not to give any allowance to any such sentence of the pope or his legate. The case being one only stated in an abridgment, cannot be sifted; and it is very immaterial, because it is clear that it related to the temporal incidents of excommunication given to it by the English law, over which, of course, the pope could have no control; and a similar observation applies to another citation, to the effect that an excommunication under the pope's bull was of no force to disable any man in England. It must be easy to show that these citations are distorted and misrepresented, but it would not be worth while, as they are clearly irrelevant. This observation is supported by the next of Lord Coke's citations on the subject, where a party pleaded the pope's bull of excommunication, and the judges, instead of at once saying that the plea was idle, demanded merely whether the party had it authenticated by the certificate of the ordinary; and as he had it not, they said that it was not sufficient — *i. e.*, the *proof* of the bull — and therefore, by the rule of the court, the plaintiff was not thereby disabled. Whence it plainly appears that the law was the direct contrary of what Lord Coke had laid down, and that papal bulls of excommunication were recognized, when duly authenticated, even to work a legal and temporal disability, and that there was a regular rule of practice or of evidence established, whereby such bulls must be authenticated by the seal

spiritual judicature by new descriptions, provision was made by statute for correcting several irregularities wholly

of the ordinary, as a security against the danger of forgery — a very sensible rule. But it is wholly immaterial what the rule of law was upon the subject of legal or temporal disabilities, for of course such matters must be governed by the temporal law; so when Lord Coke cited the Year-Book of Henry IV. to show that the papal excommunication was of no force in England, he simply misrepresented what the court said, which was, that it was of no force in a court of law, unless certified by the seal of the bishop, which plainly implied that *when* so certified it was of force, *even* in a court of law (*Year-Book*, 14 *Hen. IV.*, 14), though it is wholly immaterial whether it was so or not. It is, however, *not* immaterial to observe that it was by such gross misrepresentations of the law the people and parliament of England were induced to adopt the royal supremacy, as asserted and exercised by Henry. Lord Coke goes on to state that in that case it was held that if any bishop do excommunicate any person for a cause that belongeth not to him, the king may intimate the bishop, and command him to absolve him, which, if it were so, so far from proving that the crown had any spiritual supremacy, would prove directly the contrary, for if it had such jurisdiction, it could exercise it by *dissolving* the sentence of excommunication, instead of which all that the king could do in such case, as Lord Coke goes on to say, was to seize the bishop's temporalities. But the truth is, that nothing of the sort was said by the court, and what they *did* say was, that if the bishop excommunicated any one *contrary to the law*, the king could write to demand that the sentence be dissolved. But then excommunication, even a papal excommunication, was not, as the case itself shows, contrary to law, unless it was directed against a party for obtaining or obeying a legal judgment, or to prevent him from so doing, that is, where the sentence was directed and designed to obstruct the course of law. Nor even then would the courts have cared for it, but that by our law excommunication carried with it certain legal and temporal disabilities, and the papal excommunication was attempted to be used in that case to disqualify a party from suing on the statutes of præmunire and provisors, which, as the judges said, would have been an easy mode of getting rid of the statutes altogether, and so would be contrary to reason and law. It was of such an excommunication, it was said, that even if thus used, provided it were duly authenticated, the courts would be obliged to recognize it; and although the party using it should be dealt with severity by the courts under those statutes, as for a contempt, that of itself implied the validity of the sentence, for if it was wholly invalid, the courts would simply disregard it, and treat it as something idle. The whole question was stated correctly enough in a passage in another case in the Year-Books of Henry IV., of which Lord Coke only gives this part: "The pope cannot alter the laws of England;" and no doubt he could not, and never pretended to do — that is, the temporal law, for the question in the case was one of temporal law, for it related to the right of patronage, which the law deemed temporal. A papal bull was pleaded by way of dispensation, the effect of which would be to deprive the king of his right of patronage; but the plea was reversed, and argued upon, and only objected to as interfering with the temporal right. "The grant of the apostle," said the chief-justice, "cannot change the law of the land, for if the king had title, the apostle cannot deprive him of it" — that is, if he had a legal title to a temporal right, the right of presentation or patronage. It was answered by a phrase often to be met with in the books, and which was evidently at that time a legal maxim, *Papa omnia potest*; to which, however, the chief-justice replied, "I do not dispute the power of the apostle, but I do not see how he, by

of a clerical nature, and for an entire reform of the ecclesiastical law; instead of endeavoring to repress the luxuri-

his title, could change the law of England" (*Year-Book*, 11 *Hen. IV.*, fol. 38). It would be impossible to imagine a clearer admission of the papal supremacy, or a more correct definition of its scope as being spiritual, and of the distinction between the spiritual and the temporal. That case, it has been stated, was on the statutes of *præmunire* and provisors of benefices; and those statutes themselves, and the cases thereon, disprove Lord Coke's position, and show that the papal supremacy was recognized by the law of England. The scope of these statutes was temporal rights; the statute of provisors relating to papal presentations in contravention of the legal right of patronage, and the statute of *præmunire* being directed against the procuring of papal bulls of excommunication, to enforce the papal presentations and similar claims, contrary to legal rights. The statutes themselves implied the legality of these presentations, for otherwise the statutes would not have been necessary, for the courts would have disregarded them, and the patrons would have recovered *in quare impedit*. And it was indeed sometimes asserted that it was so, but no instance can be found of a legal judgment *in quare impedit* against a papal provision. And the very reason suggested for the statute of *præmunire*—viz., that it was to protect the patrons from papal bulls of excommunication, by preventing them from being brought (11 *Hen. IV.*, fol. 77), implied that the general belief and persuasion was, that the excommunication would be valid. But be that as it may, it is wholly immaterial, since the law of England always insisted that patronage was a temporal right; and it is therefore of no importance that it upheld that right against papal intervention, though it is of importance that the statutes should have been deemed necessary to protect that right by preventing parties from procuring papal presentations or papal excommunications to enforce them, seeing that if they were illegal, such statutes must have been unnecessary. It is of still greater importance that, notwithstanding these statutes, papal presentations, papal dispensations, and papal appropriations, and other acts of the pope, in the exercise of his spiritual supremacy, continued to be recognized by the courts of law; and in the very case first cited the validity of a papal dispensation was recognized by the court, although Lord Coke actually cites it as showing the contrary—that a royal dispensation was valid, whereas that was merely thrown out *referendo* by counsel; and what the court says is, that if the apostle made a dispensation, it would be good. Nay, the chief-justice says, "When the apostle makes a provision, he does it as sovereign patron of holy church" (11 *Hen. IV.*, fol. 78); and the truth is, these statutes were made because the papal bulls of presentation and excommunication were valid in law, not because they were not so; and they continued to be valid in law, and the statutes only punished men for obtaining them. On the same principle great anxiety was shown to prevent messengers from Rome from bringing in papal letters or bulls, until the scope was ascertained (1 *Hen. VII.*, fol. 11), which would have been idle had they been nugatory in law, but very natural if they had legal validity. The pope, of course, could not interfere with the course of the temporal law, and thus, for instance, it was held not within his power to create legal sanctuary, for that was a local immunity from temporal law (*Year-Book*, 1 *Hen. VII.*, fol. 20); and so it might always have been a moot question when the privilege of clergy was *jure divino* or a mere concession of the temporal power; and it should seem that it was clearly the latter, and was so regarded; and hence Henry IV. hanged an archbishop for treason. So when any papal letters related to the temporality, they were openly disregarded (1 *Hen. VII.*, fol. 11); but this was never done with such as touched the spirituality, which

ancy of uses, by fresh statutes against the pernors of profits, it was intended to destroy the thing itself. The

were always regarded as realities, and as having legal validity. It must be obvious that a hundred instances in which the pope's interference as to the temporality was disregarded and set at naught, would prove nothing to the question, and that the absence of such cases where the spiritual supremacy was exercised by the pope would, of itself, be decisive against the theory of the royal supremacy, especially as, beyond a doubt, and it is an admitted fact that, during the whole of the previous history of the country, the pope had been actually exercising this spiritual supremacy, and it was so avowed by the courts of law in the next reign (*Grendon v. the Bishop of Lincoln, Plowden's Reps.*, 496). It would be strange if it had been otherwise, seeing that the Roman Catholic religion was established by law, and its first fundamental article was, that the pope was the head of the church; and hence, all through the books, he is called the apostle. So much, however, for all the instances the industry and ingenuity of Lord Coke could collect to negative the papal supremacy. They are not always authentic, and are always entirely irrelevant, and most of them prove the papal supremacy. Next as to these, he collects to establish the royal supremacy. These are almost entirely unauthentic, and the rest quite irrelevant. He startles his readers by citing a case of Edward IV., as showing that the king could not only exempt any ecclesiastical person from the jurisdiction of the ordinary, but could grant unto him ecclesiastical jurisdiction. Nothing of the kind, however, is, or could be, laid down in the case cited (21 *Edw. III.*, fol. 23). Thus another case is cited, as showing that the king did, by his charter, translate canons secular into regular and religious persons, which he did (it is said) by his ecclesiastical jurisdiction, and could not do unless he had such jurisdiction. Of this there can be no doubt; and for that very reason it might safely be said that the king never dreamed of doing anything of the kind. The case itself shows that he did not do so, and establishes the contrary of what Coke cited it for, for it shows that no one but a bishop could have pretended to do such a thing, for the point which is quoted in the case was, that the bishop might transfer the seculars into regulars (38 *Assize*, fol. 22). There is another citation to show that the king, by his charter, had divided a convent, and made the monks a distinct body, capable of suing and being sued; but that merely related to incorporation, which is a matter of temporal law. It is not too much to say, that such citations are fabrications and forgeries; and it was by such false citations parliament was led to suppose that the royal supremacy was at common law. Such citations as are correct are absurdly irrelevant, as the statute of Henry IV., by which the king, with the assent of parliament, gave the bishops power to condemn heretics, that is (as the context shows), to deliver them on condemnation to the secular power with a view to corporal pains, which of course no bishop could inflict; but it was always clear law that a bishop could sentence and inflict spiritual censures *pro salute animæ*. So as to statute of Henry V., as to extirpation of heresy, in like manner it gave power to arrest and punish by the temporal arm. So as to the statute of Henry V., whereby the king, with the consent of parliament, including the bishops and abbots, gave power to the ordinaries or royal commissioners to inquire into the abuses of hospitals. So of the statute of Henry VII., passed at the special instance (Lord Bacon says) of Cardinal Morton, and with the assent of the lords spiritual and temporal, giving power to the bishops to punish immoral priests or monks, by committing them to prison (1 *Henry VII.*, fol. 4). These were all measures for the exercise of temporal power and corporal punishment, and no one ever pretended that these pertained to the pope's spiritual supremacy.

grand object of barring entails, which was accomplished at last by a recovery, was now substantiated by a parlia-

So much for the instances or authorities adduced by Lord Coke to establish a royal supremacy in spirituals. But to take an instance much nearer the point in dispute than any he adduces, that is, the jurisdiction on a question of orthodoxy in a clergyman presented to a benefice. Nothing can be clearer than that this, by the law of England, was a spiritual matter, and that when it arose on a claim to have a clerk instituted, the bishop was the judge. This had been held in the previous reign (15 *Hen. VII.*, fol. 8), and the utmost length that the courts of law had gone was, that the bishop should state distinctly what the cause was for which he refused the clerk (11 *Hen. VII.*, fol. 37; *Dyer*, 293); but if it was heresy, there never was a question that it was a spiritual matter, and that an appeal lay to the metropolitan, and from the metropolitan to the pope. For such appeal was admitted to be ever a matter of a mixed nature, as matters testamentary, and such an appeal was recognized by the courts of law in the last reign, and in the preceding reigns (*Year-Books, Hen. VII., Rich. III.*). In that case a decision of a commission of delegacy from the see of Rome was recognized in the courts of law. And no one ever had heard of any commission of delegacy from the crown to hear any appeal from the metropolitan upon any ecclesiastical or spiritual question, not even in matters of a mixed nature, such as matters testamentary. Assuredly no one will find in the whole of our history any pretension on the part of the crown to exercise any such power or prerogative as a spiritual supremacy. And nothing can be more clear than that the law recognized such supremacy in the pope. The royal supremacy therefore had not its origin in the development of any of the proper powers or prerogatives vested by law in the crown. No trace of any such power or prerogative can be found in our law prior to the present reign; and its real origin must be sought therefore in some development or advancement of the royal prerogative in the course of the present reign. To discover the true origin and real nature of this new prerogative it is particularly necessary to follow the historic method, or observe the order of time, in considering the measures of the reign which led up to it, and those in which it resulted. The former may serve to show its real design, the latter may assist in determining its true nature. It has already been observed that all the more important legislation of this reign had its origin in the royal will, and were in extension of the royal prerogative. The cause of this has been already shown in commentaries on the legal history of the preceding reign. The late monarch had acquired absolute power, and the law transmitted it to his son and his successors, who carried out with vigor the same policy. Every one is aware how absolute Henry VIII. was towards the latter part of his long reign; but no historian appears to have been aware how absolute he was from the first, nor how completely the nation was subjected to his arbitrary will from the very commencement of his reign. This has been in a great degree from failing to realize the extent to which arbitrary power was exercised in the Star Chamber from the earliest years of the reign. It has been seen that Henry VII. had confirmed this arbitrary tribunal, and given it the sanction of legislative authority. But its jurisdiction, though perhaps at first salutary and almost necessary, had rapidly — as is the nature of all arbitrary jurisdiction — grown to a length of absolute power which amounted to perfect tyranny. Our author himself, in the previous chapter, justly observed, that it became the happiest instrument of arbitrary power that ever fell under the management of an absolute sovereign, as may be seen in the history of the princes of the house of Tudor, who owed the maintenance of their high prerogatives principally to the aid of this tribunal (c. xxvii.) But he failed to realize its

mentary provision in favor of that mode of conveyance; and the construction which had been entertained with

rapid growth or its momentous results in the present reign, or at all events he has not drawn attention to it. Yet this, with one or two other instances of the exercise of arbitrary power on the part of the king, may justly be regarded as affording the key to the whole policy and legislation of the reign. For by prostrating all power of opposition to the king's will, and reducing parliaments and courts of law to the position of the mere dumb registrars of a tyrant's will, the result was virtually to make the king absolute, and to determine all measures by his will; so that they turned entirely on his interests or his inclinations, or, as our author observes, his "humors." And it may be observed, that by the omission to notice the action of the Star Chamber altogether, and by failing to notice the other matters alluded to in their proper place and order of time, as occurring at the early part of the reign (mentioning them at the end, instead of the beginning), the key to the legal history of the reign is lost. And further, the certainty of our legal history, and the connection of cause and effect, and the relation of different events or measures to each other, is altogether missed or lost sight of; and events and measures appear sudden and unaccounted for, or are ascribed to the wrong causes, being attributed perhaps to causes of recent origin, when in reality they have arisen from causes the growth of many generations, and are to be traced through successive centuries. The existence and increase of arbitrary power can be clearly shown from the very opening of this reign in the proceedings of the Star Chamber; and the exercise of that power had culminated before the first ten years of the reign had passed in the positive assertion of the absolute supremacy of the crown, and in the execution of a sanguinary executive, which established a reign of terror over the nation, under the influence of which the king was afterwards absolute. In the first place, from the very opening of the reign, the tyranny of the Star Chamber prevailed, by which jurors, peers, members of parliament were coerced and overruled. It was here he was enabled to obtain (in the 10th of his reign) the conviction of the Duke of Buckingham, as his father had obtained that of Stanley. The reign of Henry VIII. kept up the continuity of that reign of terror which his father had established, and continued the supremacy of arbitrary power. A few years of his reign had elapsed when the execution of the Duke of Buckingham, upon the most frivolous prettexts, renewed that terror which the execution of Stanley had created in the previous reign; and one of the charges against the duke was, that he had declared all the acts of Henry VII. to be wrongfully done (*Mack. Hist. Eng.*, vol. ii., c. iii.). After that execution no one could have felt that his life was safe if he opposed the king; and sufficient attention has not been given to this terrible tragedy, and the terror it must have inspired among the nobility, and the influence it must have exercised in establishing an absolute power in the king. Within ten years afterwards the question of the divorce arose, which resulted in the assertion of the royal supremacy and the servile acquiescence of clergy and laity, and may safely be ascribed in a great degree to the impression left upon the mind of the nation by the fate of that powerful nobleman. The case is mentioned in the Year-Books of the reign in a manner which shows the impression it had made: "The chief-justice said that if one intend the death of the king it is high treason, for that he is the head of the commonwealth, though no act be done; and here the intent was proved by the words" (*Year-Book*, 13 *Hen. VIII.*, fol. 12). The execution of Buckingham was obtained by the pressure of royal power without a pretence of legal cause. And it may easily be conceived that the effect of such executions was to establish a reign of terror under which the king's authority was absolute,

difference of opinion respecting the like effect of the statute of fines in the last reign, was now expressly estab-

and arbitrary power was exercised. It is perfectly plain that none of the legislation of this reign could be necessary to assert the royal sovereignty, and it is manifest that, on the contrary, it had already grown to the height of a terrible and sanguinary tyranny. There was, however, another important incident in the first few years of the reign—three years before the execution of Buckingham—in which it was shown significantly that the king intended to assert a temporal supremacy as much over the spirituality as the temporality, and as against the privileges of the clergy not less than those of the laity. So early as the seventh year of his reign, he distinctly asserted the temporal supremacy of the crown, in the haughtiest manner, over the clergy; utterly declined to refer a question, even as to the privileges or immunities of the church, to the acknowledged head of that church, and claimed to decide all such questions himself. This case is mentioned by historians and by our author, at the end of the reign instead of at the beginning; but its real significance and importance cannot be appreciated without reference to the report of it in the law-books of the reign. It was the case of the claim of sanctuary mentioned by our author at the end of the next chapter. In that case such propositions as these were laid down by the counsel for the crown: "*Exemptionem clericorum non esse de jure divino. Laicos absque peccato liceat coercere clericos quosunque ob negligentiam prelatorum. Juria positiva ecclesiastica non alios ligare quam recipientes. Peritiam sacrorum canoncorum abjiciendam esse quod ipsam theologiam contempnet cujus est ancilla: tantillum ex volumine decretorum ligare Christianos et non amplius*" (*Keil*, 184). The question was discussed before the king; and the Cardinal Archbishop of York, kneeling before the king, solemnly protested that the clergy did not intend to do anything in derogation of the prerogative of the king, and that, on his own part, as he had all his advancement entirely through the king, he would not for all the world advocate anything in diminution of the royal prerogative; but that the clergy all held that their trial before the temporal judges was clearly contrary to the laws of God and the liberties of holy church, which the prelates were bound by their oath to maintain according to their power; and therefore he made request to the king, in the name of the clergy, for the avoiding danger of the censures of the church, that the matter should be determined by our holy father the pope and his council at the court of Rome; to which the king replied that his council had already answered them. Then the Archbishop of Canterbury, in the name of the clergy, enforced the request to the king, and said that in ancient times our holy fathers of the church had maintained contrary to the usage of the law of the land on this point, and some of them had suffered martyrdom in the quarrel—which, no doubt, was true enough, as has already been amply shown in the notes to a former volume of this work, only times had altered, the spirit of the age had entirely changed; and the real question was whether the immunity of the clergy from all temporal jurisdiction was *jure divino*, or of divine obligation? which, it will be observed, not even the prelates ventured to maintain. Fineux (chief-justice) answered the primate, and said that the citation of the clerks had been maintained by divers good kings and holy fathers of the church, who had been obedient to and content with the law of the land on the point. And he urged that the prelates had no authority in their law to put the party to answer as to murder or felony, which was clearly contrary to law, for by the common law recognized by statute, the clerks were to be put to their purgation, and could, if convicted, be deprived and degraded, although no doubt there was no power in the

lished by the same authority. The devise of lands, which hitherto had been practised under the cover of a use, and

bishops to inflict any temporal punishment, though the primate said that the prelates had sufficient authority to put the clerks to answer. The chief-justice answered that not only had they no authority to determine what was or was not murder by the law of the land, but they could do nothing with the clerks, so that there was no use in sending them. "*Ad quod non fuit responsum.*" And there was this obvious anomaly, which no doubt was in men's minds, that (as was painfully illustrated not long afterwards) the spiritual authorities found no difficulty in delivering up to the secular authorities persons convicted of heresy in order to be burnt, but appeared to find great difficulty in delivering over to the secular power clerks who might even be convicted of murder. There can be no doubt that the king carried with him the assent of the great body of the nation (at all events of its more educated and intelligent portion when he spoke these emphatic and memorable words upon the subject, which virtually sounded the knell of papal supremacy in this country; "By the ordinance and sufferance of God we are king of England, and the kings of England in times past have never had any superior except God; and therefore we will maintain the right of our crown, and of our *temporal* jurisdiction, as well on this point as on all others, in as ample a manner as any of our progenitors; and as to your decrees, we are well aware that yourselves of the spirituality act expressly contrary to the words of others of them, and make such interpretations of them as please you; therefore we no more agree to your desire than our progenitors in times past have done." Upon which the Archbishop of Canterbury made humble request to the king that the matter might be respite until they could have the decision of the court of Rome, and if it should stand with the law of the land, they must be well content to conform to it; *to which the king made no reply.* The practical result was that the accused clerk was indicted; but the attorney-general consented to his acquittal, there being no evidence against him. The result was the virtual abolition of the privilege; and, what was far more important, the practical assertion and ascendancy of the principle of the king's temporal authority over all classes of his subjects. On the other hand, it is equally clear that it was only the assertion of a *temporal* jurisdiction over the clergy, and did not involve in the slightest degree a pretension at any spiritual authority, or any supremacy in spiritual matters over clergy or laity. It was, however, the assertion in the most decisive manner of a plenary temporal sovereignty over clergy as well as laity against any interference on the part of the pope; so that no new legislation could be necessary to assert the sovereignty as regards the clergy any more than as regards the laity. At all events, there was no legislation with respect to spiritual supremacy; for, according to the view of the king himself (it has been seen), it was a matter entirely of *temporal* jurisdiction. And so undoubtedly it was. And, as was shown in the introductory essay and in notes to the first portion of this work, exemptions or immunities from temporal jurisdiction as to offences against temporal laws, are from their nature concessions by the state, which may be withdrawn by the same power which granted them. Hence, in the 11th year of the reign, in a question of privilege of sanctuary, the king declared in council that he could not believe the ancient kings and popes intended that it should be a protection for crimes committed out of sanctuary, so as to afford a protection and a refuge to criminals flying from justice; and he declared (as our author narrates in the next chapter) that he should take measures to reduce the privilege within proper limits. And accordingly, in the 21st and 23d years of the reign, measures passed to take away, in the worst cases, privilege of sanctuary and privilege of clergy. Neither to these acts nor to the previous declarations

had been partially allowed by a late act, was now, by express statute, indulged to every one. The benefit of

of the king in council does it appear that the see of Rome deemed itself justified in offering any opposition or even protest; and of course the same power which could pass these measures could, and in a subsequent reign did, pass further measures entirely abolishing these privileges. Hence, therefore, the temporal sovereignty was indisputably asserted and established over all classes of the king's subjects, clergy as well as laity, and no new legislation could be needed or asserted. This fact, and the force of the inferences which arise from it, are lost sight of by the author, on account of his postponing all mention of these important matters and measures until after his account of the measures as to the supremacy, whereas they in truth preceded those measures, and therefore were the precursors, not the results, of the establishment of the royal supremacy. That is, they preceded it, and prepared the way for it by accustoming the nation to see clerical privileges disregarded or destroyed; but they did not in a legal sense lead to or any way involve or imply it; nor was there any legal connection between the assertion of temporal sovereignty and of spiritual supremacy. As already seen, a series of statutes on all subjects not purely spiritual had amply secured and asserted the royal sovereignty; while, on the other hand, they left unaffected the spiritual supremacy of the pope, and asserted no such supremacy in the crown. Measures had no doubt passed against the supremacy of the see of Rome, but they were only put in force upon particular occasions, and they were allowed to be totally disregarded in others. Thus, notwithstanding the statute of provisors (25 *Edw. III.*), the pope was allowed to collate to benefices, in various cases in which he claimed the right (41 *Edw. III.*, 5; *Owen*, 144); and after the statute 7 Henry IV., c. viii., passed in affirmance of that one, even bishops continued to be elected by provisions from Rome (8 *Hen. IV.*, *Cotton's Records*, 458). And in the Year-Books of those times numerous cases are to be found in which the validity of papal presentations was recognized; and indeed they were recognized by the very laws passed to prevent persons from procuring them; for, if not valid by law, the procuring of them would have been idle, as they would be mere nullities. And, after all, the scope of these statutes was only the right of patronage, which the law regarded as temporal. The terms of the statute of præmunire were "*in curia Romana, vel alibi*;" and it had been held in the reign of Edward IV. that this latter expression meant the court of the bishop, but that both applied to temporal matters; therefore, if a man should be excommunicated for a thing which pertained to the common law, præmunire would lie (*Year-Book*, 5 *Edw. IV.*, fol. 6). It had indeed been thrown out as an opinion in the courts of law that if a clerk should sue another man *in curia Romana* of a spiritual matter, where he could have a remedy within the realm in the court of the bishop, it was a case for præmunire, for it drew the matter in question out of the realm (*Year-Book*, 7 *Edw. IV.*, fol. 3; 14 *Hen. IV.*, fol. 14). But this could not apply to appeals to Rome in spiritual matters, as there was no tribunal of appeal provided by the law ecclesiastical within the realm on such matters. And although a party who had appealed to Rome on a matter of executorship, which in its nature is entirely temporal, was held liable to the pains and penalties of præmunire (*Year-Book*, 2 *Rich. III.*, fol. 17), that was a temporal matter. It must be manifest that under these statutes, when the crown asserted its sovereignty, the papacy had practically to yield, and always did yield, so that it might be taken as firmly established that the papacy could not exercise its spiritual authority over temporal matters, but was confined to such as were purely spiritual. In the 12th Hen. VII. it was said by Frowike that "as the

clergy, which had so long stood in the way of our criminal judicature, was now abolished in the principal and most

common law held plea of things temporal, so the spiritual law held jurisdiction of things spiritual" (*Year-Book*, 12 *Hen. VII.*, fol. 22). And in the 12th Henry VIII. we find a case of disputed patronage, in which Brudnell, C. J., said, "If the incumbent shall be in by collation of the pope or presentation of the king, the action shall be against him only" (*Year-Book*, 12 *Hen. VIII.*, fol. 8). Thus in this very reign the spiritual supremacy of the pope was recognized. But then the king's courts determined the limits of the papal rights in every case; and thus the royal supremacy in temporals was secure; so that no new legislation could be required to assert the royal sovereignty, or to prevent the papal supremacy from encroaching upon it. The limits of both were laid down and preserved by law; and if the papal supremacy was exercised on any matter not purely spiritual, it was by the allowance and recognition of the law itself. Thus, in the 12th year of this reign, a papal dispensation in a matrimonial matter was pleaded, and the court of law recognized it. For it was admitted that the marriage would have been invalid but for the papal dispensation, and it recognized that the papal bull of dispensation made it valid; and this was the view adopted by the court (*Year-Book*, 12 *Hen. VIII.*, fol. 6). The law recognized that matrimonial matters were spiritual in their nature, and therefore subject to the papal authority, as the supreme spiritual authority. It was under these circumstances that the question of the marriage with Catherine arose; and it will have been observed that matrimony, it was admitted, in its nature belonged to the spiritual courts; and it does not appear that in the earlier stages of the matter it was pretended that the statutes of *præmunire* prohibited appeals to Rome on such matters. On the contrary, it is manifest that the received opinion in the courts of law was in favor of such appeals, and that the papal jurisdiction had been judicially recognized. And as the marriage was assumed to be invalid but for the papal dispensation, and Henry appeared to have been encouraged to hope that the papal authority might annul the marriage, it happened naturally enough that so long as the hope endured, the appeal to Rome, or the exercise of its appellate jurisdiction by means of a papal legate within the realm, was winked at or allowed. It was only when the monarch found his hopes were vain, the crown lawyers were found to suggest that there had been a breach of the statutes of *præmunire*; nor was he slow in acting on the suggestion, and at once a crown prosecution was instituted against the legate (Wolsey), which, as it put in operation a construction of the law practically separating the country from Rome, may be deemed the first step in the proceeding for the purpose of that separation. In October, 1529, the attorney-general commenced a prosecution against the archbishop (who was also chancellor), for procuring bulls from Rome without the king's license. No doubt, as Sir James Mackintosh observes, "the charge was the consummation of injustice, for Wolsey had obtained these bulls with the knowledge and for the service of the king, and had executed them for years under the eye of his ungrateful master" (*Hist. Eng.*, vol. ii.); and it throws a dark stain upon the character of More, that he, as the new chancellor, should have pressed to the utmost those false and groundless charges against his predecessor, the illustrious prelate to whom he owed his own elevation. But these considerations go rather to the merits, and do not affect the law. On the other hand, it diminishes one's indignation at the treatment of the prelate to find him shortly afterwards subscribing a memorial to the see of Rome, clearly threatening separation if it did not at once accede to the king's demands (*Rymer*, xiv.; *Herbert*, 141). And as this memorial was signed by two archbishops, five bishops, twenty-two united

common felonies. All these were innovations upon the ancient law, which gave a new turn, and brought these

abbots, as well as by the great body of the lay peerage, it is impossible not to perceive that the impression at that time, derived from the traditions and the legislation of many generations, was strongly adverse to the recognition of the papal supremacy, and that the monarch was but carrying out the traditional policy of the country. As Sir James Mackintosh observes, "The king and people of England were prepared by several circumstances for resistance to the papacy, though not, perhaps, for separation from the church. The ancient statutes for punishing unlicensed intercourse with the pope had familiarized the English nation to the lawfulness of curbing papal encroachments," or rather, it may be more truly said of resisting papal authority; for beyond all doubt (as has been shown in previous volumes) it was not the papal authority that had been encroaching; quite the contrary. The prosecution of the cardinal prelate legate for exercising his legatine authority within the realm involved the denial and disclaimer of any spiritual supremacy in the papacy, and it involved a total subversion of law. For, according to the law of England, as just shown, matrimony (which by the Roman Catholic religion is a sacrament) was a spiritual matter, and governed by the law of the church, and subject to the appellate jurisdiction of the papacy. And when the nation saw a man like More press the prosecution, they might naturally deem the papal supremacy disclaimed; and the marvel is how More, after thus practically disregarding it, could have shortly afterwards suffered martyrdom for it. When Cranmer pronounced sentence on the marriage case, notwithstanding the appeal to Rome still pending, he only carried out the principle involved in the prosecution, to which More had been a party. It cannot be supposed that such a prosecution was really justified by a statute which had been in force at times when Roman cardinals were chancellors; and it can only be regarded as a monstrous and outrageous perversion of the law, dictated by arbitrary tyranny. The same perversion of the law was pursued in the prosecution of the whole body of the clergy for assenting to the exercise of the papal jurisdiction within the realm, which had been repeatedly recognized in the courts of law. "Wolsey," says Sir J. Mackintosh, "had exercised the legatine power so long that the greater part of the clergy had done acts which subjected them to the same heavy penalties, under the ancient statutes which had crushed the cardinal. No clergyman was secure. The attorney-general appears to have proceeded against the bishops in the court of king's bench, and the conviction of the bishops was to determine the fate of the clergy. After this demonstration of authority, the convocation agreed to petition the king to *pardon their fault*"—i. e., to pardon their assertion of the papal supremacy—for this it was, and only this, of which they were accused. This they agreed to acknowledge as a crime—the whole body of the clergy; all the bishops and the clergy agreed, rather than forfeit their money, to acknowledge that their acting on the doctrine of the papal supremacy was a crime. This they solemnly and publicly acknowledged. And they begged pardon of their sovereign for their crime. "The province of Canterbury bought this mercy at the price of £100,000, that of York £18,000;" that is to say, these sums were paid as the penalties for asserting the doctrine of the papal supremacy, which they had hitherto asserted; and it is to be presumed that they were satisfied, according to what has been shown to be the received opinion in the courts of law, that the assertion of the papal supremacy was illegal, and that being so, of course little, or rather nothing, remained to be done, except, in order to prevent doubts for the future, to declare and define formally that doctrine of the royal supremacy which the legal and spiritual au-

points under consideration in a variety of new appearances. To these may be added, the protection and estab-

thorities of the realm had thus agreed in acknowledging to be established by the law. Accordingly, in the petition of the clergy it was proposed that the king should be addressed as the supreme head of the church, and the Archbishop of Canterbury supported the designation. It was adopted, with the addition of the words "as far as the law of Christ allows." But (as Sir J. Mackintosh observes), "thus amended, it answered the purpose of the court," which was to take the opportunity of introducing an appellation, pregnant with pretension, amidst the ancient formularies and solemn phraseology consecrated by the laws, and used by the high assemblies of the commonwealth. The new title, full of undefined but vast claims, soon crept from the petitions of the convocation into the heart of acts of parliament. But the historian forgot that it was *already there*, in effect and spirit, though not in words or terms; and (as often happens) men who had thus conceded the substance, afterwards stickled at the form. The whole body of the clergy had, to save their money, abandoned the papal supremacy, and it was idle to haggle at its necessary alternative of the royal supremacy. The very same prelates who thus renounced the supremacy of Rome, resisted all attempts at reform of abuses. For, as the historian observes, "immediately after a bill against ecclesiastical abuses was combated with success by the *bishops and abbots*." And this with perfect consistency, for in the previous reign they had resisted the attempts of Cardinal Morton, under the authority of the see of Rome, to repair some of these abuses. The supremacy was the corrective power in that church, and therefore the national clergy were always against it. And they were so now. The monarch only carried out their traditionary policy. They had a vulgar pecuniary interest in crippling the supremacy. One of the modes by which the see of Rome was supported was the payment of first-fruits; and this had always been a sore point with the clergy, and inspired them with very strong feelings of discontent. Hence they had willingly concurred in the first legislative measure directed against the see of Rome, which, with consummate craft, was directed against this point. "No practical measure had been hitherto adopted against the Roman see, but the stoppage of the *dunates*, or first year's income of vacant bishoprics, from which the revenue of the cardinals resident in Rome was derived. The statute" (the historian shrewdly adds) "touched the connection with Rome at the critical point of money, and gave it to be understood that still larger sources of revenue might be turned to another channel." By another act, the first-fruits and tenths thus taken from the pope were given to the king, and commissioners (says Mackintosh) were appointed to value the benefices, with a machinery afterwards so enlarged as to be instrumental in promoting rapine on a more extended scale (26 *Hen. VIII.*, c. iii.). Under pressure of the fear of losing money, or the hope of saving it, the clergy conceded the supremacy practically. "The convocation had been obliged to undertake that they would make no canons without the king's license; and though this measure was softened by limitations, it nevertheless served to throw light on the king's being the 'head of the church,' a phrase which, it was evident, was not intended to remain a barren title" (*Mack. Hist. Eng.*, vol. ii.). The king, no doubt, was determined to carry out the principle it embodied, and he proceeded to do so *with the entire assent of the church*. "By a series of statutes passed in the years 1533 and 1534, the Church of England was withdrawn from obedience to the see of Rome, and thereby severed from communion with the other churches of the west. Appeals to Rome were prohibited, under the penalties of *præmunire*" (24 *Hen. VIII.*, c. ii.). The clergy acknowledged that they could not adopt any constitution without the king's assent

lishment of leases for years, execution against the effects of bankrupts, the limitation of actions, the locality of trial in felonies.

(25 *Hen. VIII.*, c. xix.); a purely domestic election and consecration of bishops was established (25 *Hen. VIII.*, c. xx.); all pecuniary contributions, called Peter-pence, imposed by (or rather payable to) the Bishop of Rome, called the pope, were abolished; all lawful powers of licensing and dispensing were transferred from him to the Archbishop of Canterbury, and his claims to them were called usurpations, made in defiance of the true principle that your "grace's realm, recognizing no superior under God but only your grace, has been and is free from subjection to the laws of any foreign prince, potentate, or prelate." All this was only carrying out the principle already acknowledged by the church, and it was agreed to by the prelates in parliament. The statute proceeded to refer to this. It proceeded to affirm that "your majesty is supreme head of the Church of England, as the prelates and clergy of your realm, representing the Church in their synods and convocations, have recognized, on whom consisteth the authority to ordain and enact laws by the assent of your lords spiritual and temporal, and commons in parliament assembled" (25 *Hen. VIII.*, c. xxi.). In the next session, all these enactments were sanctioned and established by a brief but comprehensive statute, "An act concerning the king's majesty to be supreme head of the Church of England," which granted him "full power to correct and amend any error, heresies, abuses, etc., which by any ecclesiastical jurisdiction might be reformed or redressed" (21 *Hen. VIII.*, c. i.). All these measures, be it observed, passed in a parliament in which sat the prelates of the church, without opposition. Well might the historian observe: "The acquiescence, or rather active co-operation, of the established clergy in this revolution, is not one of its least remarkable features. Several bishoprics were then vacant, in consequence of the disturbance of intercourse with Rome. Six bishops, however, sanctioned by their vote every blow struck at the church. Fourteen abbots were generally present, when the number of temporal peers who attended was less than forty. The bill for subjecting the clergy to the king as their sole head, was so favorably received as in one day to be read three times and passed; no division appears on these measures. And after the vacancies in the episcopal order were filled up, the usual number of bishops attending without opposition was sixteen" (*Hist. Eng.*, vol. ii.). This acquiescence on the part of the church in separation from its acknowledged head, and the substitution of royal for papal supremacy, is however more intelligible when it is regarded as only the practical development of a series of measures which had long rendered the royal authority really supreme, and reduced the papal supremacy to an empty name. There is, indeed, another reason for an acquiescence which at first sight seems so remarkable, viz., that by the statutes thus passed, the denial of the royal supremacy was rendered capital; and that this was not meant merely as a menace, but was intended to be put in force, was soon afterwards shown by the execution under those statutes of Fisher and of More. As the historian says with truth, his difference with Rome had not yet extended to doctrine, but was confined to the rejection of the papal jurisdiction (*Hist. Eng.*, vol. ii., c. viii.). The historian observes, no doubt truly enough, that "the title of supreme head of the church was assumed by Henry with considerable wariness, in language which might be addressed to subjects in one sense, and defended against antagonists in another, and which was remarkable for the gross but common fallacy of giving a false appearance of consistency to jarring reasons, by the use of the same words in different acceptations" (*Ibid.*). But this was in deference to the prejudices and feelings of the

Such were the principal regulations of this reign, which had a lasting influence upon our jurisprudence, and stand,

ignorant multitude, who had by no means followed out the logical consequences of principles so keenly and acutely as the crown lawyers had done. These arts or artifices of policy, which discovered the extent and importance of the revolution only by slow degrees to the people, are (says the historian), "observable in the statutes of the reign as to the supremacy of the 24th, 25th, and 26th of the reign" (*Ibid.*). The preamble to these statutes recites that the crown of England is independent, and that all classes of men, whether of the spirituality or the temporality, owe obedience to it; that the Church of England has been accustomed to exercise jurisdiction in courts spiritual, and that the encroachments of the Bishop of Rome from ancient times had been checked by the king's prerogative (24 *Hen. VIII.*, c. xxii.). These encroachments (as already has been seen) had been rather on the part of the crown; but it was here enough that past legislation had been for three or four centuries directed against the claims or pretensions of Rome; and there is an evident appeal here, on the part of the crown, to that long course of legislation—an appeal, the force of which the historian, from want of sufficient acquaintance with the effect of the statutes, as declared in the courts of law, failed to appreciate, and he equally failed to perceive the extent of the royal pretensions. He observes: "It is evident that the doctrine concerning the king's supremacy might well be reconciled with the papal authority, if the latter were confined to a strictly spiritual jurisdiction on the part of the pope, and if the former were limited to civil and coercive powers on that of the king." This, however, was all that the papacy had ever claimed as of right, or *jure divino*, though the law had, at an earlier period of our history, conceded more. The historian himself was aware of this distinction, which has been particularly pointed out in the notes to the former volumes of this work. But though the most learned Romanists have generally agreed that the coercive powers of the ecclesiastical courts arose from grants of certain portions of civil jurisdiction made by the state to the church (for example, in testamentary and matrimonial causes) yet the court of Rome has never been willing to limit itself, by any formal act, to this narrow and dependent jurisdiction. This, however, was very immaterial, if it acknowledged (which is indubitable) that the state had a right thus to limit it, and that all that the church could claim, *jure divino*, was jurisdiction over spiritual matters. And this the law had hitherto allowed, and, indeed, still did recognize and allow; only it had of late, under cover of the old statutes, asserted itself against the right of appeal to Rome, or the exercise of any appellative jurisdiction by Rome, *even in spirituals*. This, it is obvious, was now the real point in contention, which can be shown in two ways: first, by the fact, that the pope claimed every jurisdiction in spiritualties; next, that the king claimed such jurisdiction. This was exemplified in the great marriage case, recently decided, which was a matter purely spiritual. It is beyond a doubt that the king claimed that it should be decided in the spiritual courts of the realm,—*i. e.*, by the Archbishop of Canterbury,—and it was, in fact, so decided. It was, therefore, an entire error on the part of the historian, and it only shows how utterly this great question has been misunderstood, to suppose that the claim of Rome was for more than spiritual jurisdiction, or that the claim of the king was for less. It was entirely a question, on each side, as to purely spiritual jurisdiction. Of anything more than that, the papacy had been already deprived by the decisions of the early courts of law, grounded on the old statutes; and it was because the king was now claiming more than had hitherto been supposed to belong to the crown (though it logically fol-

even at this distance of time, among the foremost objects of legal discussion. Others are of less importance, because

lowed, from the principles laid down), that he was compelled to proceed with the care and caution described by the historian. However the words of the statute might be otherwise construed, it was intended by such swelling novelties of expression to inure the minds of the people to unwonted modes of thinking on the relation between the papal jurisdiction and the regal power (*Ibid.*). The king had, it is manifest, simply set himself in the place of the pope, and substituted the royal supremacy for the papal. In the last statute on the subject, it is enacted that the king of this realm shall be reputed to be the only supreme head of the Church of England; that as such he shall enjoy all titles, jurisdictions, and honors to the said dignity appertaining, and that he shall have full authority to correct all errors and abuses which might lawfully be corrected by any spiritual jurisdiction, any usage, prescription, foreign laws, or foreign authority to the contrary notwithstanding (26 *Hen. VIII.*, c. i.). Upon this Sir J. Mackintosh observes, that it leaves without elucidation whether it was intended to assert only, like the former acts, the proposition that the king is the sovereign of all classes of his subjects. But if the historian had followed the course of law and legislation on this subject more closely, he would have seen that much more than that must have been intended: for that had been settled centuries before, and indeed had never been disputed, except as to spiritual matters, as to which it is plain it was now asserted. "It passes over" (says the historian truly enough) "the essential distinction between what the king may do out of parliament by his royal prerogative, and what he can do only in parliament, by the consent of the estates of the realm." But it was the era of despotic power, and in that, therefore, there was nothing remarkable. At that time the real power of the realm was embodied in a despotic monarch. The assertion of his supremacy, in spiritual matters as well as temporal, was the assertion of the supremacy of the state as representing the lay power. And that was in reality the principle then established. "It may mean" (proceeds the historian) "that the king and parliament are dependent in no respect on foreign power, and that the legislature may change, by ventures, the arrangements of any institution, however respectable, which can owe its being and establishment to Anglo-law." But no institution did or could owe its being and establishment to Anglo-law if it was purely spiritual. And as to what was not so, but mixed with the temporal, the law already was settled. What remained was to settle it equally and in the same way as to what was purely spiritual in forms of creed, doctrine, faith, and worship, rites, and ceremonies; and this was what was intended by the king, though he had to proceed with caution and awe. It is under cover of all this vague and loose language, which treats the headship of the church as if it were an ancient and well-known magistracy, that the unwary reader is betrayed into a notion (in which he would not otherwise have acquiesced) that this statute is declaratory, and that the power of jurisdiction and amendment in all cases where ecclesiastical superiors formerly exercised such powers, was not so much granted to the crown as acknowledged to be a portion of its ancient prerogative. This, no doubt, is true enough; but it indicates that the object of the king was to assert a *spiritual* supremacy. And this indeed the historian puts into two lines, with perfect truth and clearness:—"The jurisdiction of the pope seemed thus to be totally superseded by the powers vested in the crown" (*Ibid.*). In other words, the royal supremacy was substituted for the papal, which by the contention of the crown itself, was purely spiritual. This was put plainly enough in the subsequent statute, an act to extinguish the authority

of shorter duration: such were the poor laws; many of the new courts erected by this king; new treasons and

of the Bishop of Rome, by which the maintenance of that authority was subjected to the penalties of *præmunire*; and all persons in a public position were to take an oath abjuring it, and taking the king to be the only head of the Church of England. Upon this the historian observes that "this memorable statute was the first which introduced into civil legislation the union of a promise of submission with a declaration of assent to opinions. It treats the refusal of the prescribed oaths as a species of political heresy." In the confusion of its savage haste, it punishes the refusal to abjure the pope as a higher offence than acts in maintenance of his authority (*Ibid.*). "By these statutes," (proceeds the acute historian) "together with others prohibiting official intercourse with Rome, the revolution in church government contemplated by Henry VIII. was consummated in England, which was placed in a situation unlike that of any other state in Christendom, acknowledging the ancient doctrine of the Roman Catholic Church; but placing the king as a sort of lay patriarch at the head of the ecclesiastical establishment" (*Ibid.*). And that this was so was shown practically by the appointment of Cromwell (who had become Henry's chief minister) to the new office of the king's vicegerent for good and true ministration of justice in all causes and cases touching the ecclesiastical jurisdiction, and for the godly reformation and redress of all errors, heresies, and abuses in the church (31 *Hen. VIII.*, c. x.). This, it is obvious, was a purely spiritual jurisdiction, or, at all events, *included* it. And such jurisdiction undoubtedly was exercised by the king, and his successors in purely spiritual matters, that is to say, matters of faith, worship, and discipline. The objects indeed of the new office, as the historian observes, were so various that it would have been difficult to define its powers by law; and being wholly new, they could not be limited by usage. They were, therefore, really unbounded. The great object of the king all through was, it must be manifest, the attainment of arbitrary power over spirituality as well as temporality. It is not probable that the pope, had he conducted himself with ever so great moderation and temper, could hope, during the lifetime of Henry, to have regained much authority or influence in England. That monarch was of a temper both impetuous and obstinate, and having proceeded so far in throwing off the papal yoke, he never could again have been brought tamely to bend his neck to it. Even at the time when he was negotiating a reconciliation with Rome, he either entertained so little hope of success, or was so indifferent about the event, that he had assembled a parliament, and continued to enact laws distinctive of the papal authority. The people had been prepared by degrees for this great innovation. Each preceding session had retrenched something from the power and profits of the sovereign. Care had been taken to teach the nation that a pope was entitled to no authority at all beyond the bounds of his own diocese (*Burnet*, vol. i., p. 144). The proceedings of the parliament showed that they had entirely adopted this opinion, and there is reason to believe that the king, after having procured a favorable sentence from Rome, which would have removed all doubts with regard to his second marriage, might indeed have lived on terms of civility with the Roman Pontiff, *but never would have surrendered to him any considerable share of his assumed prerogative.* The importance of the laws passed in the session of 1533 was sufficient to justify this opinion. All payments made to the apostolic chamber, all provisions, bills, and despatches, were abolished. Monasteries were subjected to the visitation and government of the king alone. The law for punishing heretics was moderated. The ordinary was prohibited from imprisoning or trying any

new offences of various kinds, with new-fangled tribunals for their examination; all of which were repealed or

person upon suspicion alone, without presentment by two witnesses; and it was declared that to speak against the pope's authority was no heresy. Bishops were to be appointed by a *congé d'élire* from the crown, or, in case of the dean and chapter's refusal, by letters-patent. The law which had been made against paying annales or first-fruits was finally established, and a submission which had been exacted from the clergy received the sanction of parliament. In this submission the clergy acknowledged that convocation ought to be assembled by the king's authority alone; they promised to enact no new canons without his consent, and they agreed that he should appoint commissioners, in order to examine the old canons, and abrogate such as should be found *prejudicial to the royal prerogative*. And an appeal was allowed (only) from the bishop (or rather the archbishop) to the king in chancery (*Hume's Hist. Eng.*, c. xxx.). The king found his ecclesiastical subjects as compliant as the laity. The convocation ordered that the act against appeals to Rome should be affixed to the doors of all the churches in the kingdom. And they voted that the Bishop of Rome had, by the law of God, no more jurisdiction in England than any other foreign bishop, and that the authority which he and his predecessors had there exercised was only by usurpation, and by the sufferance of the English princes. The bishops went so far in their compliance, that they took out new commissions from the crown, in which all their spiritual and episcopal authority was expressly affirmed to be derived ultimately from the civil magistrate, and to be entirely dependent on his good pleasure (*Collier's Eccl. Hist.*, vol. iii.; *Hume Hist.*, c. xxx.). The parliament being again assembled, conferred on the king the title of the only supreme head on earth of the Church of England, as they had already invested him with all the real power belonging to it. In this memorable act the parliament granted him power, or rather acknowledged his inherent power, to vest and repress, redress, reform, order, correct, restrain, or amend all errors, heresies, abuses, contempts, offences, and enormities, which fell under any spiritual authority or jurisdiction (26 *Hen. VIII.*, c. i.). The act passed empowering the king to name commissioners for framing a body of canon law was renewed, but the project was never carried into execution. Henry thought that the present perplexity of that law increased his authority, and kept the clergy in still greater dependence. . . . The king, though determined utterly to abolish the monastic orders, resolved to proceed gradually in this great work, and he gave directions to the parliament to go no further at present than to suppress the lesser monasteries. . . . It does not appear that any opposition was made to this important law, so absolute was Henry's authority (c. 32). Another accession was gained to the authority of the crown. Whoever maintained the authority of the Bishop of Rome, by word or writ, or endeavored to restore it in England, was subjected to the penalty of *præmunire*—that is, his goods were forfeited, and he was put out of the protection of the law. And any person who possessed any office, ecclesiastical or civil, or received any grant or charter from the crown, and yet refused to renounce the pope by oath, was declared to be guilty of treason. Henry, finding a great increase of authority to accrue, had determined to persevere in his present measures. There was a great division of opinion, but the authority of the king kept every one submissive and silent, and the new assumed prerogative, the supremacy with whose limits no one was fully acquainted, restrained even them. The convocation discovered the servile spirit by which they were governed. They said that they intended not to do or speak anything which might be unpleasant to the king, whom they acknowledged as their supreme head, and whose commands they were resolved

superseded by statutes in the next or following reigns. Upon reviewing the regulations of this active period,

to obey (*Collier's Eccl. Hist.*, vol. ii., p. 119). They came at last to decide articles of faith, and their tenets were of as motley a kind as the assembly itself, or rather the king's system of theology, by which they were resolved entirely to square themselves. These articles, when framed by the convocation, and corrected by the king, were subscribed by every member of that assembly (*Burnet*, vol. i., p. 215). Henry made any vote of his parliament and convocation subservient not only to his interests and passions, but even his caprices. The concurrence of these two national assemblies seemed to increase the king's power over the people, and raised him to an authority more absolute than any prince in a simple monarchy, even by means of military force, is ever able to attain (*Hume's Hist. Eng.*, c. 31). This, indeed, was the great feature in the character of the reign, that parliament itself was made an engine of oppression and a means of establishing the most monstrous tyranny. What was the nature and extent of this new prerogative of the spiritual supremacy of the crown may be illustrated by several cases in the next reign. It was resolved by the judges at a committee, before the lords in parliament, that a convocation cannot even assemble without the king's writ, nor make canons without the royal assent, nor execute them without such assent, nor if contrary to the king's prerogative, although, at the same time, it was said that the power of convocation was purely spiritual; whence it plainly appears that the supremacy claimed was now spiritual (12 *Coke's Reps.*, 73), as, for instance, in determining in heresy, which, by the common law, was, as Lord Coke says, within the power of convocation (*Case of Heresy*, 12 *Coke's Reps.*, 57). No doubt, after the lapse of more than half a century, this monstrous doctrine began to rouse a reaction, but it was a reaction which resulted in a revolution. It was one of the main causes of the rebellion, and nothing is more clear than that the practical development of the supremacy destroyed the power of the monarchy. The nation insisted on the supremacy being transferred from the crown to parliament, and the act of uniformity of Charles II. was really and truly a parliamentary settlement of the subject. But, in the meantime, the prerogative of the royal supremacy, as originally asserted and upheld and exercised for great part of a century — viz., a prerogative to regulate the faith and worship of the church by royal ordinance — was destroyed; and no one now would venture to assert it. The supremacy of the laity, however, was established — of the laity as represented in parliament, instead of the royalty. Many authorities in support of this view can be adduced from the law-books of the age. Thus, in the reign of Elizabeth, the question was raised, whether the queen, by the statute 25 Henry VIII., having that supremacy united to the crown which the pope, it was said, had usurped, could grant dispensations, without the bishop, which the archbishop could not grant! And it was resolved by the court that the queen could grant dispensations, as the pope could do in cases where the archbishop had no authority by the statute to do so, because all the authority which the pope had is given to the crown, "quia tout authority quel le pape asoit est donc al corone" (*Moore's Reps.*, 542). And in the next reign all the judges assembled in the Star Chamber declared that the king could deprive clergymen for nonconformity with the lay canons (sanctioned by himself), and the reason given was, that the king had a supreme ecclesiastical power (*Ibid.*, 755); and, further, that they took it to be clear that the king could, without parliament, make ordinances and institutions for the government of the clergy, and could deprive them if they did not obey, and that he could issue commissions to exercise this power of deprivation (*Ibid.*). And accordingly the high commission court did exercise

whether of the former or latter kind, it appears that such important changes had not been effected within the same space of time since the days of Edward I.

this power to the end of the reign of Elizabeth, not only over clergy, but laity; and though it was appointed by statute, the judges declared that a statute was not necessary, and that the commission could emanate from the crown by virtue of its prerogative of the supremacy. It was, indeed, a few years later declared that the commissioners could not fine or imprison the laity without the authority of statute; but it was never doubted that they could administer the ecclesiastical law established by the crown, and deprive the clergy for breach of it, so that virtually the crown had power to prescribe the religion and direct the faith and worship of the nation. But in every other respect they were, according to this new doctrine of the supremacy, entirely unnecessary. And it will be found that not only in the view of the sovereign, but according to the opinion of parliament and in the judgments of the courts of law, the crown, by virtue of this new prerogative of the spiritual supremacy, had full authority to define and declare matters of faith or worship, and did so, except so far as restrained by statute. For no one, even in that age, ventured to say that the sovereign could alter or depart from an act of parliament, though no doubt the sovereign did and could compel parliament to do so. Still, the passing of statutes on the subject tended to obscure and disguise the naked deformity and atrophy of the new prerogative of the royal supremacy, and it is possible that, as Sir James Mackintosh suggests, many of those who acquiesced in these statutes did so for the very reason that every statute passed upon the subject did in fact tend to restrain this most monstrous prerogative. It is indeed probable that many of those who at first assented to it were not blind to its novelty and deformity, but acknowledged it rather as representing the supremacy of the laity than of royalty. It was true, that in that age royalty represented, or rather absorbed, all the power of the laity, but for that reason, because it did represent it, the supremacy of royalty was regarded thus far with satisfaction, that it was at all events the ascendancy of the laity, or at least of the lay power, over the spiritual. And that to the present day is the aspect and the light in which the royal supremacy has commended itself to the approval of thinking men. No one, even in that age, really in his heart approved of the tyranny of royalty as represented by Henry, and since that time no one has pretended to approve of it, still less of his rapacity. But at all events, he was a layman, and represented in that respect the laity. And though in his time the laity was represented by royalty, the time was coming, and was perhaps already foreseen, when the laity would have their own representatives, when popular representation would no longer be a name, a fiction, and a form, but a tremendous reality; and in those days, whenever this should come, it was foreseen that parliament, not the crown, would dictate the faith and worship of the nation, *i. e.*, of the state (which in those days was deemed to mean the same thing); and then all the power manifested by a tyrannical monarch would be wielded by a triumphant people. It is thus, and thus only, that we can account for the assent or acquiescence which Henry's atrocious measures received from the great body of the intelligent part of the nation. It cannot be conceived that they had any sympathy with the tyranny and rapacity of Henry; well they foresaw that the work he was doing in his tyranny would never be undone, and would lay the basis for a new state of things, and they excused his rapacity as they excused his tyranny. What was the nature of the spiritual supremacy then assumed and asserted by the crown? That it was something quite different from anything

The statutes which contain the multitude of objects above alluded to, must necessarily fill a considerable space,

ever before assumed and asserted (at all events formally and avowedly) must be manifest from the very fact that it was so assumed and asserted; for there could be no necessity for the assumption and assertion of any power or prerogative already known and recognized, and already assumed and exercised, as was now pretended, from time immemorial. For the language of parliament and the crown lawyers was, that it was a mere restitution to the crown of an ancient power or prerogative. But if so, how comes it to be now for the first time assumed and asserted; and how comes it that it had never been in terms assumed and asserted by any sovereign, not even by Henry II., at the time he was assuming an attitude most hostile to the church? How comes it that, although the church had been growing weaker and weaker, losing ground constantly, so that it could hardly assert its most ancient privileges, and was, in fact, losing them one after another, no sovereign had ever set up such a claim in terms before. No doubt the crown had set up many claims, but they were claims rather to restrain the exercise of the papal supremacy than to exert the royal. Indeed, these measures would have all been unnecessary but for the legality of the papal supremacy, and they plainly implied that legality. For instance, the pope used to make provisions, as they were called; and what was a "provision"? It was a designation of the person who should be incumbent, and an admission, institution, and induction of him without going to the bishop (*Plowden's Reps.*, 498). These provisions could only be upheld on the ground that the pope was supreme head of the church, and entitled to exercise a supreme spiritual jurisdiction. And in point of fact they never were disputed, and therefore a statute passed to restrain subjects from accepting them would have been wholly idle and unnecessary unless they were legal, for otherwise the court of law upon *quare impedit* would simply have set them at naught, which was never done. Again, the pope claimed to make appropriations of benefices without the assent of the bishop, and such appropriations were beyond all doubt always recognized as legal, because they were deemed spiritual (*Grendon v. Bishop of Lichfield, Plowden's Reps.*, 489). Thus it was said the pope used to act as supreme ordinary, the bishops being his inferiors. And so as to dispensations, etc. So that his authority was looked upon as absolute, and bound the bishop, as his inferior, in all his acts (*Ibid.*). And so as to the exercise of an appellate jurisdiction, as to which again statutes were passed to restrain subjects from invoking it, which would have been unnecessary had there been no such appellate jurisdiction, as then the pope's decrees would have been idle nullities, and set at naught, as they never were. Even in the last reign and the present, appeals to Rome were allowed in matters spiritual, or even of a mixed nature, as matrimony and testament, if allowed to be of ecclesiastical jurisdiction. And beyond all doubt the crown had never claimed to do these things any more than it had ever in terms asserted or assumed a spiritual or even ecclesiastical supremacy; for if so, no appeals to Rome could ever have been recognized, and no statutes to abolish them could have been required. Evidently, then, the assumption and assertion of an ecclesiastical or spiritual supremacy in the crown was something new. The same conclusion results from the simple fact that More, who had been Lord Chancellor, and had never disapproved of the previous statutes, suffered death rather than acknowledge the royal supremacy, which he understood to mean spiritual supremacy. And this was again and again laid down by the courts of law — viz., that the royal supremacy was a spiritual supremacy. "And such authority and jurisdiction as the pope used to exercise within this realm was acknowledged by

and would unavoidably require a great portion of the subsequent history. But a style of composition in framing

parliament in 25 Henry VIII., and in other statutes to be in Henry VIII. So that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within the realm; so that, for instance, he might, *being supreme ordinary*, make an appropriation without the bishop, and by his royal authority supreme and ecclesiastical. And such other like acts of authority and jurisdiction he might do which the Bishop of Rome was used to do within the realm" (*Grendon v. Bishop of Lincoln, Plowden's Reps.*, 496). That is a purely spiritual jurisdiction and authority. For such beyond a doubt was the pope's; and in the very case cited it was laid down that the particular act in question, an appropriation, was spiritual. Hence, in the deliberate judgment of the courts of law, the statutes of 25 Henry VIII. vested in him a purely spiritual supremacy, which certainly had never, ever since the Conquest, been asserted before. Such a supremacy certainly was asserted by Henry and his successors, who claimed to define and declare what should be the faith and worship of the church, and only resorted to parliament to give their declarations the sanction and coercive power of pains and penalties. All through these reigns it will be seen that the crown always asserted its sole right to regulate the formularies of faith and worship for the church, and parliament acquiesced in the claim, and merely registered and enforced by pains and penalties the regulations prescribed by the crown. Henry enforced obedience to his will in this as in every other respect by the terrors of the scaffold; and Elizabeth all through her reign could never suffer the parliament to debate upon matters ecclesiastical, but merely to pass the measures she proposed, which inflicted pains and penalties on those who ventured to differ from her upon religion. The sovereignty was already duly established, which clearly shows that it could not have been merely as intended for that object, since it was already attained. The crown was already virtually supreme over all classes, spiritual as well as temporal, and there was nothing to prevent it from executing a bishop for any capital offence, as a bishop was actually executed for upholding the papal supremacy. And the same conclusion may be reached in a different way; for, after these statutes as to the supremacy, other statutes were passed for the final abolition of benefit of clergy, showing still more clearly that the supremacy had nothing to do with the sovereignty, *i. e.*, with civil or temporal sovereignty, and that it was a power purely spiritual. Such then was the true nature of the royal supremacy, which is further illustrated by its results. "The first experiment," says the historian, "with the immense force thus acquired was the suppression of the religious houses" (*Mack. Hist. Eng.*). In the year in which had commenced the series of statutes which established the royal supremacy—the 23d—an act had passed suppressing the "chantries"—that is, the endowments for the purpose of securing perpetual prayer for the dead, which, even if within the mischief of the mortmain laws, had all been erected with the license of the crown; so that, even if the measure were within the power of the state, it was an act of spoliation; and if the endowments had been suppressed, the lands should have gone to the heirs of the donors. But for the suppression of religious houses, as it involved actually the dissolution of the religious communities, an exercise of spiritual supremacy was required, since not even an appropriation could take place without the assent of the spiritual authority. The king himself, in the 15th year of his reign, had ratified a papal bull suppressing some of the monasteries; and he knew that he could not, while the papal supremacy remained recognized by the law, dissolve religious houses. Hence he waited until parliament, in the 25th year, had sanctioned his

statutes began now to obtain, which swelled their size beyond all example of former times. This consisted

assumption of the spiritual supremacy; and then his first exercise of it was to sanction an act of the 27th year suppressing all the lesser houses. There is considerable reason to believe that this, rather than the marriage question, was the main motive for the assumption of the supremacy; for the other matter was actually settled when Cranmer, under the protection of the statutes of *præmunire*, declared the first marriage invalid, and celebrated the other. At all events, as the historian observes, the first exercise of the supremacy was the dissolution of the lesser houses in the 27th year; and then, in the 31st year, the king having, in the meantime, by coerced surrenders or enforced dissolution, obtained possession of the others, parliament passed an act declaring him to be in legal possession of all the religious houses which had come to, or might come to, his hands by any means; that is, as the judges afterwards significantly interpreted it, by any means however questionable (*Hobart's Repts.*). It is obvious that, even in those days of servility, parliament shrank from affirming the legality of those measures. Parliament passed an act to dissolve and grant to the king all religious houses whose income was below a certain amount. The power of parliament, of course, in a certain sense, is omnipotent; and it originates and overrides all questions of law, though it leaves open the question how far it is in accordance with the principles of law. The course taken, however, as to the larger houses raised important questions, which arrest the attention of the legal historian. The abbots were, most of them, induced to surrender; and waiving any question of validity of these acts as made under the influence of terror or duress, an important question arises, whether they could legally surrender their lands, and whether it would not require the authority of parliament to alienate them. It appears that this doubt occurred to the minds of the king's ministers, for there was a statute passed which provided that all monasteries and other religious houses dissolved, suppressed, surrendered, forfeited, or by any means come to the king, shall be vested in him, his heirs, and successors forever (31 *Hen. VIII.*, c. xiii.). This, which was one of the earliest results of the royal supremacy, had indirectly a great influence in directing the subsequent legislation of the reign with respect to property. It was the object of the king to distribute the vast amount of property thus acquired, most of which was upon lease, at money rents, which, in the language of the law, was called *socage* tenure, as distinct from feudal or military tenure. The transfer of so large a quantity of land from the monasteries to the crown, and from the crown to lay subjects, and by those subjects to others, by means of leases or conveyances, receiving rents instead of the ancient feudal services, the effect of which was, that the land was held on common socage tenure, naturally tended, in various ways, to an experience of the greater convenience of that tenure under the altered circumstances of the times. Indeed much, perhaps most, of the land was already let on lease for rents in coin or corn, and thus the new proprietors would, for a considerable time be under the necessity of accepting this tenure, and would naturally, having found its advantage, for the future. The only objection to the conveyance of land to uses, and the use of it as a means of devising land, was the loss of the incidents of feudal tenure; and it is obvious, that as the objection could not apply to lands held in socage, that is, on rent (for the simple reason that, whatever the nature of the transfer, the rent must be paid, and the payment of it by the tenant would enable the immediate landlord to pay it to the ultimate owner): and such certain payments were found far more advantageous to all parties than the uncertain, irritating, and oppressive incidents of feudal

partly in the matter and substance of them, and partly in the manner and form. Every parliamentary regulation was accompanied by a minute detail of particulars, and an accumulation of provisos, exceptions, and qualifications: these were conveyed in a diffuse and redundant language, crowded with synonymous terms and tedious repetitions. A regulation which in the reign of Edward I. would have been comprised in a few lines, was now spun out into as many clauses: so that the statutes of this single reign actually cover as much paper as all those preceding it, up to Magna Charta. The same fashion prevailing, those of the two subsequent reigns increased in the like proportion.¹

With this prospect before us, it becomes necessary to adopt some rule by which we may abridge and simplify our materials, without doing any injury to the subject of our history. Many of these statutes are directed to concerns not at all of a juridical kind, and may therefore, as it should seem, be passed over in silence. Those that were of short duration, either because they were soon repealed or were at first but temporary, may be treated more or less at large, according as they seem to deserve a place in our historical investigation: the remainder are such as had an extensive and permanent effect, and therefore are entitled to be detailed with all the minuteness

tenure. The more such socage tenure, or tenure by rent, extended itself, the less objection there would be to the power of devising land by will: and hence, naturally enough, a few years after the abolition of the monasteries, that power was directly conceded; and, along with it, there was a final legislative sanction of conveyances to uses, by the conversion of the *cestui que use* into the *legal*, as he already was the *real* owner. Nor were these the only changes in the law arising indirectly from the abolition of the religious houses. As already mentioned, nearly all the land they had held was let on lease, and held under covenants and conditions. When the lands were acquired by the crown, and transferred to new owners, then it became necessary (the transfer of land on such a scale having never before taken place) to provide legal power for the new owners to enforce the covenants and conditions. And hence the statute allowing assignees of the reversion to sue thereon. Thus did important alterations of the law arise out of measures never intended to effect them, and by reason of necessities these measures created. Thus, therefore, a whole series of measures, which greatly affected the law of property, resulted indirectly from the suppression of religious houses, which was one of the earliest results of the assumption by the crown of that spiritual supremacy which was called the royal supremacy, as distinguished from the papal supremacy, which it superseded, and for which it was substituted.

¹ In the edition of the statutes that usually goes under the name of *Rastall*, the reign of Henry VII. ends at p. 390; that of Henry VIII. ends at p. 902; and that of Philip and Mary at p. 1200.

which the compass of this work will allow. But even these, for the reasons above mentioned, must sometimes, and may in general, with great propriety, be somewhat curtailed. It will very often suffice for the purpose of this inquiry, to state the substance and effect of a statute, without following the identical words, or enumerating every provision it contains. By means of such abbreviation, the legislative acts of this reign may be contracted into a narrative of moderate length, neither impeded nor embarrassed with the irksome formality of the materials from which it is collected. While the historian amuses himself with the one, the other will be left for the more authentic information of the practiser.

Under the control of the above method, we shall now take a view of the statutes of this king, in the following order. Those claim our first notice which tend to give strength to the political system, and vigor to the sovereign power; such are those for regulating the legal polity of Wales, and abrogating all franchises exercised independent of the crown. Next to these should follow such statutes as affected the parliament. The next are such as produced the abolition of papal usurpations, and wrought a reformation in our ecclesiastical constitution: then the laws that concerned the civil state: after these will naturally follow the laws relating to private property and the administration of justice: and, lastly, those relating to our criminal law. This is the order in which we intend to speak of parliamentary provisions during this reign.

Of the first kind are the statutes concerning Wales. At the time when the parliament came to the resolution of introducing a more complete system of laws and administration of justice into Wales, the judicial establishment there seems to have been of the following kind: From the time of Edward I., the English law had prevailed to a certain degree, and had at length in general obtained the ascendant, in the government of property and the punishment of offenders; but this was always mixed with their local customs: to these they adhered with great predilection; and they were encouraged in this partiality by the number of petty jurisdictions into which the country was divided. The administration of justice in a great part of Wales was in the hands of the lords marchers, each of whom exercised

Of judicature
in Wales.

a kind of feudal sovereignty within his district, and became accordingly, in the person of his steward, the judge, with a full enjoyment of all the casualties of judicature, such as fees, fines, amercements, and forfeitures. These casualties, probably, the lords possessed in a greater or less extent, according to the nature of their franchise; some being the king's lords marchers, others being lords marchers, in a manner, independent.¹

Besides the variety of laws and usages that must follow from so many distinct tribunals, they were likewise productive of disorders in the police, from defects of justice, owing to neglect, collusion, or the clashing of different jurisdictions. It was to remedy this, and to strengthen the royal authority over the principality, that a *president and council* had been lately appointed under a commission from the king. These constituted a court, and seem to have maintained a kind of pre-eminence and superintendent authority over the other judicatures of the country; but the whole of their power and authority does not exactly appear. Another support of the king's sovereignty consisted in the justices by him appointed. There was, and had been in very early times, a justice of Chester,² whose jurisdiction comprehended the county of Flint; there was also the king's justice of North Wales, whose jurisdiction included Anglesea, Carnarvon, and Merioneth; and the justice of South Wales, which included Carmarthen, Pembroke, Cardigan, and Glamorgan;³ the remainder of Wales being then not divided into counties, but under the government of the lords marchers, as before mentioned. Where justice was administered by judges appointed from the king, it cannot be doubted but the English law was pretty generally known and observed. The judicial arrangement in North Wales seems to have been tolerably well adjusted; for in the course of the settlement now about to be made, that is always referred to as the model by which this institution was to be framed, and the guide by which many of its operations were to be governed. Such was the state of the legal polity in Wales in the 26th year of this king, when the first statute was made for reforming it.

The stat. of 26 Henry VIII., c. 4, was made to prevent

¹ *Vide* vol. ii., c. ix.; and stat. 26 Hen. VIII., c. 6, s. 1.

² *Vide* vol. ii., c. ix.

³ Stat. 27 Hen. VIII., c. 5.

the friends and kindred of criminals from laboring and suborning jurors. It is thereby directed that the officer of the court for the due keeping of the jury should not suffer them to eat or drink, or any one to speak to them. There is a very remarkable clause in this act which ordains that, if the jurors acquitted a felon, *contrary to good and pregnant evidence*, or otherwise misbehaved themselves, the judge might compel them, upon pain of imprisonment, to be bound by recognizance to appear before the president and council, and abide the decision of that tribunal on their conduct. The president and council might imprison or fine them at their discretion; an authority which had been exercised by judges in England¹ without the sanction of an act of parliament, but not without great murmuring; and it was not till long after this that a solemn determination was pronounced against the legality of such procedure.²

This is followed by an act, in the same sessions,³ containing provisions very similar to those made in the earlier times of our history; which shows the influence of laws at that time in Wales to have been much what they were in England in the reigns of Henry III. and the beginning of Edward I. After complaining of the great disorders prevailing in the principality, owing to the disobedience of the law, it directs all persons, upon monition given, to be attendant at the courts of justice, under certain penalties and forfeitures; none were to appear within two miles of the session or court with any kind of weapon or armor, upon pain of imprisonment and fine: and all courts were to be kept in the *most sure and peaceable place* that could be chosen.⁴ To give redress against the oppressions of lords marchers, they and their stewards or officers were made liable to be fined by the president and council for unjust imprisonment of any one within their district. To be sure of the execution of the law against the worst offenders, it was enacted, that coining, murder, and other felonies should be tried in the next English county;⁵ and an acquittal or *fine-making* in any lordship should be no bar, if the prosecution in the English county was brought within two years.⁶ But the justices might discharge such offender, if convicted, upon his finding sureties not to commit any

¹ *Vide* vol. ii.² In Charles II.'s reign.³ Chap. 6.⁴ Sect. 4 and 6.⁵ Sect. 6.⁶ Sect. 7.

felony, and to be of good behavior: this was to be with the consent of the president and council; it was to be only once, and then not without paying a fine. This custom of *fine-making* had been very ancient in Wales, being the remains of the old jurisprudence of the country; and the parliament were tender in abrogating an indulgent law, which was supported by the prejudices of the people, when they thought it might be put under some wholesome restriction.

In the same sessions two laws were made for correcting disorders in Wales;¹ one, to punish those who assaulted and beat people, and then took refuge within the boundaries of neighboring lordships; the other,² to introduce there the late regulations concerning clerks convict. In the following sessions some provisions were made of greater importance than any of the preceding: these were by stat. 27 Henry VIII., c. 5, 7, and 26. The first of these statutes was designed to enforce obedience to the criminal law; and it authorized the chancellor to appoint justices of the peace, justices of the *quorum*, and justices of gaol-delivery in Chester and Flintshire, and in the counties of North and South Wales; with the same power to execute the law as the same magistrates had in England. The second was occasioned by some abuses prevailing in forests in Wales; such as a custom for foresters to exact fines, on various pretences, of persons going through the forest, and other exactions of the like kind; all which were thereby abolished.

Before we take notice of the third act made in this session concerning Wales, it will be proper to mention one which stands before it in the statute-book, and which made a part of the same plan for rendering the process of law more effectual, by placing every judicature in the kingdom in the hands of the king. This was the act for taking from counties palatine the prerogatives which had long been annexed to them, in derogation of the sovereign authority of the king: it is stat. 27 Henry VIII., c. 24, and is entitled, "An Act for Recontinuing Liberties in the Crown," importing, as the preamble states, that "divers of the most ancient prerogatives and authorities of justice appertaining to the imperial crown of the

¹ Chap. 11.

² Chap. 12.

realm had been severed from it by the gift of the king's progenitors, to the detriment of the royal estate and the delay of justice." For reformation of this, it was thereby ordained, that, for the future, no person shall have authority to pardon offences committed in any part of the realm or in Wales, or the marches thereof, but that "the king shall have the whole and sole power and authority thereof, united and knit to the imperial crown of this realm, as of good right and equity it appertaineth;" and none but he alone was ever after to appoint justices in eyre, of assize, of the peace, or of gaol-delivery, in all shires, counties palatine, and all other places in England, Wales, and the marches thereof.

All writs and indictments were for the future to allege facts as done against the king's peace, and were to be in the king's name; only they were to be *tested* in the name of the person who had the county palatine or franchise; and justices appointed in the county palatine of Lancaster were to have their commission under the seal of Lancaster.

There was a provision in this act in favor of some of these liberties. The justice of Chester and Flint was excepted out of every alteration made by this statute,¹ and was therefore to exercise his authority according to the commission he before received. The Bishop of Ely and his temporal steward of the isle of Ely, the Bishop of Durham and his temporal chancellor of the county palatine of Durham, the Archbishop of York and his temporal chancellor of the shire and liberty of Hexam, were to be justices of the peace within their several liberties, with all the authority annexed to the office of such magistrates.

Thus were all the prerogatives enjoyed by these petty sovereigns resumed, and reannexed to the crown, while the form of their judicial establishment still remains.

After the regulations made by this act, a way was opened for a more complete reformation in the judicature of Wales, which was now undertaken on a larger scale, by chap. 26 of the same statute. It is thereby, in the first place, ordained, that the dominion of Wales should forever be incorporated with, and annexed to, the realm of England; that persons born there should enjoy all the privileges and laws of this kingdom, as natural-born sub-

¹ Sect. 18.

jects (a); that lands should be inherited after the English tenure, without partition; and, finally, that all the laws, ordinances, and statutes of England, and no other, should be executed in Wales, in such manner as directed by that act. To insure the due administration of these new laws, it was enacted, that certain lordships marchers should be annexed to certain English and Welsh counties, and that the residue should be divided into counties, under the names of Monmouth, Brecknock, Radnor, Montgomery, and Denbigh, the first to be taken as an English, the rest as Welsh counties;¹ and a commission was to be appointed for dividing these new counties into hundreds, and for settling the divisions of some others. It was further directed, that justice should be administered in these new Welsh counties, and in Carmarthen, Pembroke, Cardigan, and Glamorgan according to the English law, by such justices as the king should appoint (b), and in such form and fashion as it then was and had been used in the three counties of North Wales (namely, Anglesea, Carnarvon, and Merioneth), which we have seen was an old establishment, and was now the original, according to which the new arrangement was adjusted.

It was further directed, that all courts should be proclaimed and kept in the English tongue: all oaths, verdicts, and the like, were to be in English; and no person was to have any office who did not understand English. A saving was made of a moiety of forfeitures and fees to lords marchers, as well as all courts-leet, barons, waifs, strays, and other casualties and fruits of seigniority. There was a saving of usages and customs then prevailing in North Wales; and notwithstanding what had been declared to the contrary in the former part of the act, it was provided, that lands which had been by custom time out of mind partible among the heirs, should so continue.² To ascertain what the customs and laws obtaining in Wales were, a commission was to be appointed to make

(a) Upon this it was held that, by force of the latter words, and *not* of the former (which it was thought would have been insufficient to have such an effect), the inhabitants had the benefit of English statutes passed *before* the annexation (*Browning v. Beston*, *Plowden's Reps.*, 130).

(b) It was afterwards held that error lay in the king's bench upon a judgment given in Denbigh in an ejectment (*Griffith v. Apprice*, *Cro. Eliz.*, 104).

¹ Sect. 3.

² Sect. 35.

inquiry concerning them; and such as should be thought by the king and his council proper to be retained were to be continued in full force and effect.¹ In aid of this provision, it was also declared, that the king should have power for three years to suspend, abrogate, or alter this act,² and for the next five years to erect such courts and appoint such justices within the principality as he should think fit: so that a final and perfect establishment of the judicial polity of Wales was reserved for some future settlement, which was then in contemplation.

This was accomplished by stat. 34 and 35 Henry VIII., c. 26, which is entitled, “An Act for Certain Ordinances in Wales,” and contains the whole constitution of the principality, its laws and judicature. The provisions of this act are said to have been granted at the humble suit and petition of the king’s subjects in Wales. It declares, that Wales, consistent with the late revolution effected there, should consist of twelve counties: the eight ancient counties—that is, Glamorgan, Carmarthen, Pembroke, Cardigan, Flint, Carnarvon, Anglesea, and Merioneth; and the four new ones—that is, Radnor, Brecknock, Montgomery, and Denbigh, and that the limitations of hundreds, as settled by the commissioners appointed according to the late act, should be observed.

As to the judicature of the country, it directs, that there should continue a president and council, as before; that a sessions, to be called *the king’s great sessions in Wales*, shall be held twice a year in every county (a);³ that this court shall hold pleas of the crown in as ample manner as the king’s bench; and pleas real, personal, and mixed, as completely as the common pleas in England.⁴ The detail of regulations made by this act may be stated briefly, as follows: The sessions is to last six days. Days are to be given from day to day, and from sessions to sessions, at the discretion of the justices. There is to be an original and judicial seal (for the different circuits), to seal all original and judicial writs and process; the *teste* of every bill and judicial process to be under the names of the justices. All actions, real and mixed, are to be by *original*. Personal actions above forty shillings may

(a) This court continued to exist till our own time, and was abolished by the 11 Geo. IV. and 1 Will. IV., c. lxxx.

¹ Sect. 27.

² Ibid., 36.

³ Ibid., 4-9.

⁴ Ibid., 12.

be either by original or by bill; those under are to be always by *bill*. Original bills are to be sealed with the judicial seal. Fines of land with proclamations levied before justices there, are to be of the same force as fines in the common pleas.¹ Errors of judgments before the great sessions, in pleas real and mixed, are to be brought by writ of error into the king's bench in England; in pleas personal, to be reformed by bills before the president and council.² No execution to be stayed by writ of false judgment; but in case the judgment is reversed, restitution is to be made.³ When there are many personal actions which cannot be tried at the great sessions, it was ordained that, for despatch, they may be heard at a petty sessions before the deputy justices there; and further, that no suit shall be prosecuted by bill before the said justices, under twenty shillings.⁴ The fees of officers, for the execution of process and drawing the proceedings, were fixed by the statute, with authority, however, to the justices to alter them at their discretion.

Besides the superior magistrates, the president and council, and the justices of sessions, there were to be justices of the peace in every county;⁵ their number and qualifications were set forth;⁶ and direction was given for the due holding of inferior tribunals, as the sheriff's county courts and tourn, with court-baron and other courts.⁷

In addition to the appointment of magistrates, and prescribing the bounds of their jurisdiction, several rules were laid down respecting the law of crimes and of property. It was ordained, that no felon should be permitted to make fine (as they before had done, according to the usage of the country, confirmed in some measure by the late act),⁸ but should suffer the law, unless reprieved by the judge.⁹ The stat. 26 Henry VIII., c. 6, concerning the trial of crimes and felons in the next English county, was confirmed; but by another clause of this act,¹⁰ it is declared, that if any murder or felony is committed, no one, upon pain of fine and imprisonment, shall make an end or agreement with the offender, unless he make the president or council, or one of the justices, privy thereto; a

¹ Sect. 33, 34, 35, 41.⁴ Ibid., 94.⁷ Ibid., 73, 75.⁹ Sect. 84.² Ibid., 113.⁵ Ibid., 53.⁸ *Vide ante*.¹⁰ Ibid., 100.³ Ibid., 114.⁶ Ibid., 55, 56.

provision which evidently allowed a continuance of this practice.

It was ordained, that trials in the county, baron, and hundred courts, should be by wager of law, or verdict of six men, at the pleasure of the party who pleaded the plea.¹ In other courts, in actions personal, where nine of the jury were sworn, the sheriff may, upon default of the rest, fill it up by a *tales de circumstantibus*.² In foreign pleas triable in another Welsh county, a transcript of the record is to be sent thither; but if the matter of such pleas is laid in an English county, it is, nevertheless, to be tried in Wales.³

The following are the provisions relating to property. It was now finally enacted, that lands should not be partible among the heirs,⁴ as in *Gavelkind*; but should descend, as in English tenures. No mortgage is to be allowed but according to the course of the English law;⁵ all persons may sell and alien their lands, the same as in England;⁶ and lands there are to be subject to statutes staple, and recognizances acknowledged in England.⁷ No sale of goods in any fair or market is to change the property;⁸ nor is any person to buy live cattle, unless it is proved by witnesses where it was bought; and this is to be observed under pain of a fine.

Notwithstanding so extensive and complete a judicature was established within the principality, there was a clause in this act which provided for the introduction of process from the superior courts, on certain occasions. It was ordained that, "for urgent and weighty causes," process should be made and directed into Wales by the special commandment of the chancellor, or any of the king's council, as had been used before.⁹ There was a reservation to the king of a power similar to that given by a former statute relating to the administration of justice in Wales, by which he was enabled, in writing under the great seal, to change, add, alter, order, diminish, and reform, all the before-mentioned provisions, as it should seem convenient; and from time to time, at his pleasure, to make laws for the government of Wales.¹⁰

Thus far of those provisions made by parliament for

¹ Sect. 84.

⁴ *Ibid.*, 91.

⁷ *Ibid.*, 94, 95.

⁹ *Ibid.*, 115.

² *Ibid.*, 103.

⁵ *Ibid.*, 92.

⁸ *Ibid.*, 104.

¹⁰ *Ibid.*, 119.

³ *Ibid.*, 88, 89.

⁶ *Ibid.*, 93.

maintaining the political authority of the sovereign.

^{Of parliament.} The legislature made some acts respecting its own conduct and constitution. The first of these was passed at the close of a session, with the necessity of such a provision, no doubt, plainly before their eyes. It was enacted by stat. 6 Henry VIII., c. 16, in consideration of the many weighty matters which were often left to the end of a session, that no member depart nor absent himself until the parliament was fully finished, ended, or prorogued, unless he had license from the speaker and commons, which license was to be entered on record in the book of the clerk of the parliament: if any did otherwise, he was to lose his wages, and the inhabitants of the county, city, or borough, should be discharged thereof.

In order to communicate to Wales all the privileges enjoyed by English subjects (*a*), it was ordained by stat. 27 Henry VIII., c. 26, that two knights should be chosen for the county, and one burgess for the town of Monmouth; that one knight be chosen for the county of Brecknock, Radnor, Montgomery, and Denbigh, and for every other county in Wales; and one burgess for every shire-town, except Merioneth. These elections were to be as in England, with the same fees and allowances.

The next statute on this head was for imparting the privilege of being represented in parliament to the county palatine of Chester. The preamble of stat. 34 and 35 Henry VIII., c. 13, states, that the inhabitants of the county palatine complained of suffering in their property from severe laws, which they attributed to their bearing no part in the making of them. To satisfy the inhabitants, it was therefore enacted, that there should be two knights for the county, and two burgesses for the city, to be elected by process issued by the chancellor of England to the chamberlain of Chester, his lieutenant or deputy, and from him to the sheriff of the county; which elections and returns by the sheriff were to be the same as those in the county palatine of Lancaster, and the rest of England.¹

(*a*) It was afterwards held, that the act made Wales parcel of England (5 *Coke's Reps.*, 50).

¹ There is another provision in this act, which, though relating to another subject, is worth notice. It was a practice in the county palatine for a per-

There was a statute for better ordering the collection of the wages of knights and burgesses in Wales and Monmouth. It seems that the wages of a knight were now four shillings a day, that of a burgess two shillings, and it continued from their setting out to their return home, with the costs of their writs, and other fees and charges. There were two writs: one, *de solutione fœdi militis parliamenti*; and another, *de solutione fœdi burgensis parliamenti*. These used to be sued out by the member; and by this act the sheriff, mayor, or other head-officer, was to make his payment within two months after such writ delivered to him.¹

The laws relating to the national church and the ecclesiastical polity make the most remarkable part of the legislative acts during this reign. Of the ecclesiastical polity. The attack upon the papal authority, and the reformation of abuses among the clergy, was carried on by fits, as the king's humor directed him; and they fill on that account a multiplicity of statutes. To arrange these in some order, and to preserve, at the same time, a kind of history of this famous revolution in the church, will be attended with difficulties. These acts are of different sorts, and had different objects; some were designed to demolish the ancient fabric, and others to lay the foundation of a new one; some concerned the papal authority solely; others applied to matters of domestic regulation. It follows that many of these statutes, being now *functa officio*, are sunk into oblivion; while those which furnished the basis of our present establishment in the church are generally known. Perhaps the most satisfactory way of treating the one would be to give also a detail of the other. We shall, therefore, take a view of the statutes that relate, in any way whatever, to the church and ecclesiastical law, as nearly in the order in which they were made as the subject will permit. This will form a sort of juridical narrative of the Reformation, interrupted sometimes and retarded by the recital of regulations either directly or incidentally ap-

son indebted to another to come to the exchequer there, and make oath that he would pay his creditors as soon as he was able; upon which the officers used, of their own authority, to issue a writ in nature of a protection, and to delay the creditors from making any demand of their debts. It was now ordained, that no such writ should issue without special warrant from the king.

¹ Stat. 35 Hen. VIII., c. 11.

pertaining thereto, and which the nature of this work requires should be somewhat fully enlarged upon.

After the disgrace of Cardinal Wolsey, and while the affair of the king's marriage was depending, in the 21st year of this reign,¹ a parliament was called, when three bills were sent up from the commons, levelled at some of the most exorbitant abuses of the clergy; one was against unreasonable exaction of fees for the probate of wills; another was for regulation of mortuaries; another was to restrain pluralities and non-residence, and to forbid the clergy taking farms.

We have before seen what provision had been made by parliament, and by provincial constitutions, for preventing extortion and imposition in the article of fees for probate and administration. Abuses, however, seem still to have maintained their ground.² The stat. 21 Henry VIII., c. 5, complains of the impositions practised by ordinaries, notwithstanding two former statutes made to ascertain their fees, namely, stat. 31 Edward III., stat. 1, c. 4; and stat. 3 Henry V., c. 8;³ and it enacts that nothing shall be taken for probate of a will, and making inventories, where the goods do not exceed £5, except 6d. to the clerk; where they do not exceed £40, not more than 3s. 6d.; and where they exceed that, 5s. Thus far of testaments. It ordains, with more precision than the statute of Edward III., who shall be entitled to the administration in case of intestacy; it directs that it shall be granted to *the widow of the deceased, or to the next of his kin, or to both, as the ordinary in his discretion shall think good (a).* The

Fees of ordinaries.

(a) The jurisdiction of the ordinary in matters of testament was so anomalous that no other reason could possibly be given for it than that which has been given for it in the first volume, under the head of "The Saxon Laws" — viz., that as regards the proof of wills, it arose originally in an age when none but ecclesiastics could read or write, so that of necessity they had the care and custody of written wills, and that as regarded intestacy, they had the cognizance of that species of trust or confidence which was supposed to be involved, as a matter of conscience, in the due application of the effects of the deceased, in the absence of any written will, or even the absence of any express or declared will at all. The ecclesiastics took cognizance of all matters of conscience, whence arose the jurisdiction of equity in an age when ecclesiastics were chancellors. And whether there was a will or was not, there arose a matter of conscience in the administration of the effects of a deceased person; if there was a will, to carry out its directions (so far as they were consistent with conscience); and if there was not a will, then to distribute the effects according to conscience. In either case, conscience, it

¹ Ann. 1529.

² Vide ante.

³ Ibid., vol. iii., c. xiii., xix.

same rule is to be observed where executors refuse to prove the will, and the execution of it is to be committed

was clear, required that in the first place the debts of the deceased should be paid; and it was an entire error to suppose that as to this there was any difference between the canon and the common law. And until his debts were paid the deceased had no right to have his will regarded; and the canon and common law in fact both made this will for him, that the debts should first be paid. When they were paid arose the question of the distribution of effects; and upon this the will, if he left one, would be consulted and carried out. The first question would be, however, whether there was a will, and whether it appointed executors? If not, then it was for the ordinary to appoint administrators to make distribution of the effects as conscience required — first for the debts, and next for the relatives and the presumed will of the deceased. It is obvious that there was nothing in its nature spiritual in the question whether or not there was a valid will; and the origin of the ecclesiastical jurisdiction in such a matter can only be explained as has been suggested. However, anomalous as it was, it existed, and it was recognized in the courts of law that a will (if personalty, the only kind of will allowed at common law) was provable before the ordinary; and that if the executors under a will did not come forward when cited by him to do so, he could commit administration to others (*Year-Book*, 3 *Hen. VII.*, fol. 14; 4 *Hen. VII.*, fol. 13). It was recognized as a maxim in the courts of law, "*ius testamentorum pertinet ordinario*" (*Ibid.*); and if there was a question whether there was a valid will, or which of two wills was valid, it was (as to personalty) for the ecclesiastical court. And upon the decision of the ecclesiastical court an appeal lay to the pope, who could appoint a commission of delegacy to determine the matter in this country (*Year-Book*, 4 *Hen. VII.*, fol. 13, 14; *Sandes v. Peckham*). In that case the executor under one will of the deceased sued the executor appointed under another, who set up that other will and a decision of papal delegates in its favor, to which the plaintiff replied that this decision was by default, and that under another commission of delegacy from the pope it was determined that the will under which he claimed was to stand, and that he was executor. And upon this he had judgment (*Ibid.*). There was always such a close connection between the functions of executor and administrator, that parties who administered were chargeable as executors; and if a person was sued as executor, he had to deny not only that he was executor, but that he had administered. On the other hand, the duties of executors and administrators as to debts were the same; and so as to any surplus not disposed of by will; and the defence for either an executor or administrator would be that he had fully administered; while as to either an unlawful disposition of any part of the goods would lie a *devastavit*, or wasting of the assets, which involved personal liability to creditors. The executor or administrator was equally chargeable by the law at the suit of creditors to the true value of the assets which had come to their hands (*Year-Book*, 20 *Hen. VII.*, fol. 5). And they were equally bound to pay debts, and legal debts, and debts in their proper order (*Ibid.*), i. e., paid before simple contract debts (*Ibid.*). If an executor had no assets, that was in itself a sufficient bar to an action, until assets came to his hands (*Year-Book*, 16 *Hen. VII.*, fol. 10), while on the other hand, if a person intermeddled with the goods, he was liable as executor though he was not made executor (*Year-Book*, 20 *Hen. VII.*, fol. 5), and while a creditor could sue an executor who had administered, and need not sue one who had not (16 *Hen. VII.*, fol. 4), he could sue a person who had administered though not appointed either executor or administrator, for an administrator was executor, i. e., *de son toit*, as it was said. If the party sued

to the relations. The ordinary is also empowered to make his election between two or more who are of equal degree

as executor confessed the action, the judgment was *de bonis testatoris*; if he denied it falsely, then it was in default of assets *de bonis propriis* (*Year-Book*, 14 *Hen. VII.*, fol. 29; 15 *Hen. VII.*, fol. 9). Before this act, therefore, a party who meddled with the goods, *i. e.*, to deal with or dispose of them, was liable as an executor; but in the last reign it was held that if a party had only collected the goods of the deceased, *ad opus episcopi*, and in no other way, he was not so liable (*Year-Book*, 10 *Hen. VII.*, fol. 28). In the last reign also it had been held by all the judges that if executors administered, or the ordinary paid a simple contract debt before a debt of specialty, they should be chargeable of their own goods, if the assets remaining were not sufficient. It was urged that the ordinary ought not to be liable, as he was only judge; but Fineux, chief-justice, said, He was chargeable at common law by action, and he shall have an action by the common law for the goods of the intestate taken out of his hands, which was agreed to. Also it was said by the judges to be clear that probate of testament would not pertain to the spiritual court if it were not for long usage and custom, and not by the spiritual law (*Year-Book*, 11 *Hen. VII.*, fol. 13). And it was said in that case that the party should have an action of debt against the ordinary, for he had the goods, not to his own use, but to the use of the intestate (*Ibid.*). And it was deemed in the courts of common law in entire harmony with the canon law, that it was with goods of the intestate that his debts should be paid. There was no necessity, therefore, for any new statute to enforce that law, though it was for the benefit of the ordinary that he should be able to commit administration to others. And after this statute it was held that if an action was brought against the ordinary, and he committed administration, the action should abate, for the ordinary was compellable by the statutes to commit administration (*Bro. Abro., Administration*, fol. 39; 34 *Hen. VIII.*). And one great object of the statutes was to give right of action on behalf of the estate, for the ordinary had no action to recover debts due to the estate, but the administrator had (*Ibid.*, fol. 44). The liability of the executors or administrators for the debts or pecuniary obligations of the deceased was based by the common law on those principles of justice and moral obligation which were inculcated by the common law, and in the cases at this time on the subject the courts of law recognized the obligations of conscience as the ground of the obligation resting on the executors. Thus in this reign, before the above statute, an action was brought against executors on a guarantee given by the testator; and it was alleged that the testator had left assets sufficient after payment of debts and legacies; and the court held that the action lay; for that the soul of the deceased would be in jeopardy if the money were not paid (*Year-Book*, 13 *Hen. VIII.*, fol. 12). There was indeed a rule of law that an action of *debt* would not lie against an executor, because he could not wage his law as the testator could have done; but this was an absurd technical reason, since wager of law itself was rare and useless, seeing that cases were decided on the evidence, and the burden of proof would lie on the plaintiff. The scope of that part of the statute which related to the appointment of administrators by the ordinary was, it will be observed, permissive and enabling, allowing him a greater freedom of choice. Of course it did not affect the common law *liability* of parties who chose to intermeddle and administer *without* letters of administration, and who were executors of their own wrong. Some years after this statute a question arose whether if a man made two his executors, and one proved the will in the name of both, against the will of the other, and then an action of debt was brought against them as executors, the one who had not been willing to be

of kindred;¹ nor is anything to be taken for such administration by the ordinary, unless the goods amount to more than £5; and then, if they do not exceed £40, he is to take only 2s. 6d.

Executors and administrators are to give security for a due administration;² and taking two of the legatees, or two creditors, or, in default of them, two of the next of kin, they are to make an inventory of the effects (a). All

executor could plead that he was not executor, nor had administered as such. And it was said that he could if he had not administered; for the *probate* did not make him executor unless he *administered*. Shelley, indeed, wished that it was otherwise, for that probate itself was an act of administration; but the chief-justice, Fitzherbert, said it was not so unless the goods of the deceased were meddled with, and that probate was a spiritual act, *i.e.*, an act of the spiritual court, which did not stop him (*Year-Book*, 27 Hen. VIII., fol. 11).

(a) This part of the statute related to the other head or branch of the subject—the administration of the assets of the deceased, which, whether by executor or administrator, would be, under the statutes, according to the rules of the common law; and thus in “Doctor and Student” there is a discussion as to the ancient common-law rule that a debt created by a specialty could not be discharged by a mere proof of payment without an acquittance under seal. It is to be observed that it contemplated that the ordinary would not personally administer; but that administration would take place under his care. But the courts of common law would require that he should proceed as to proof of debts, and then discharge according to the rules of the common law (*Brown v. Wooller*, *Yelv.*, 92). The distribution of the residue, after payment of debts, was afterwards settled by the statute of 22 and 23 Charles II., c. x. An important question arose in this reign which illustrates as well the relations of law and of equity, and the power of the decisions of the courts in moulding and modifying the law, and the degree in which the law depends practically upon these views, whether narrow or enlarged. It also, as it is conceived, is an example of a most mischievous perversion of the law through a mere misunderstanding of an ancient judicial maxim, and the real ground and reason of it. In the 12th of the reign a man brought his action on the case against executors showing a debt due to him on simple contract from the testator, and that assets sufficient for payment of debts and legacies had come to the hands of the defendants, but that they had not paid: a form of action, it will be observed, which, supposing the sufficiency of the assets shown, would have charged them personally, as they might be charged in equity, and even at common law (supposing an action maintainable against them at all), through the indirect and circuitous process of recovery of judgment, and suggestion of a devastavit or wasting of the effects. Accordingly, the court held the action would lie, because otherwise there would be no remedy, seeing that action of debt would not, it was held, lie against an executor, because he could not “wage his law” (having no personal knowledge of the matters) as the testator might have done. And Fineux, chief-justice, said very truly, that the case was out of the legal maxim, *actis personalis moritur cum persona*; for that was where the injury or damage was corporal, as if a man beat another and died; for a man could not be punished when the action was gone dead. But in this case the plaintiff could have what he

¹ Sect. 3, 4.

² *Ibid.*, 4.

persons offending are to forfeit as much as the money taken contrary to this act; and, besides, £10, half to the king and half to the party aggrieved. The act further ordains, that lands being devised to be sold, the money thence arising, or the profits of the lands, shall not be considered among the goods and chattels of the deceased. So that many persons who had property of some value, might in those days, when personalty was in general not large, come within the privileges above allowed to those who had not £5 in goods.

Mortuaries, or *corse-presents*, were a customary due claimed by the parson in many places upon the death of anybody. Stat. 21 Henry VIII., c. 6, puts some restraints

might have had if the party had been in life, *i. e.*, the power of the goods; and for that the action had not died, for any party could have his remedy. And it was not so in the case of battery (12 *Hen. VIII.*, fol. 12). The reporter added, indeed, a *quære*, for that if the testator had lived, he would have waged his law; but in a subsequent reign, in Slade's case, it was held that this was no reason why an action on the case should not be maintainable; and a little consideration will show that this was so, and also that the chief-justice was right in his view of the real sense and meaning of the old legal maxim, *actio personalis moritur cum persona*; and that both sense and reason were in favor of his view is manifest, and has in modern times been affirmed by the legislature, and a reference back to an earlier age of our legal history will show that he was equally right in law. For in the *Mirror*, as has been shown in a previous volume, the term personal citation meant an action for injury to the person. And so as to wager of law, for in its real and original spirit it had become obsolete, seeing that, as it has been shown in the first volume, it arose in an age when there was no such thing as trial upon evidence; but the jurors were only witnesses, and gave their verdict as well as they could on their own knowledge of the matter; so that if they happened to have no knowledge of it, they could give no verdict; and if they did, injustice might be done. In such an age wager of law or compurgation — by the oath of the defendant and his compurgators — in causes of private contracts was not wholly unreasonable. But in an age when cases were decided upon evidence, it was entirely absurd. For whether the action were against the debtor or his executors, the burden of proof would lie upon the plaintiff, and therefore they could sustain no real injury or prejudice by reason of the loss of wager of law. To prevent the creditor therefore from resorting to an action for his debt, merely because the executor could not wage his law, would be an unreasonable injustice. This decision therefore was founded on sound law and good sense. Nevertheless fifteen years later it was overruled by more ignorant and narrow-minded judges. The same case had arisen, and it was urged that the action was grounded upon the executors having assets in their hands after all debts paid, and it was reasonable that they should pay the debts of their testator, for the debts still remained though the debtor was dead. But it was held nevertheless that the action lay not, and the former decision was overruled in times of ignorant contempt, without any reason being given (27 *Hen. VIII.*, fol. 23). The result was to send the creditors into chancery, until the reign of James I., when Slade's case restored common sense and affirmed the action (4 *Coke's Reports*).

upon these demands, and ordains, that none shall be taken where the movable goods of the deceased are under ten marks; and where they are under £30, after all debts are paid, not more than 3s. 4d. is to be taken, and in no case more than 10s. Mortuaries were hereafter not to be taken on the death of a wayfaring man, feme covert, child, or person not keeping house; and they were entirely abolished in Wales.

These provisions had a more general effect than those that follow; for while they restrained the clergy from raising sums on the people in certain fees and dues, the following act only confines the clergy to a due discharge of their function, by forbidding, under penalties, all other avocations. The stat. 21 Henry VIII., c. 13, was made, as it says, among other reasons, for "the increase of devotion and good opinion of the lay fee toward the spiritual persons." It accordingly ordains, in the first place, that no spiritual persons shall take lands to farm under pain of forfeiting £10 per month (a). This, however, does not extend to the farming of any temporalities during the vacation of bishoprics, or collegiate or cathedral churches; and any persons¹ not having sufficient glebe, may rent lands for the mere expenses of their household (b). Moreover, no spiritual persons are to buy

(a) In the 27th of the king a writ of debt was brought upon the statutes against a vicar, for that he had occupied a farm contrary to the statute. It was pleaded that he had not held to farm contrary to the statute, and it was held that upon this the defendant could show that he held the land for the maintenance of his own house (27 *Hen. VIII.*, fol. 22), that is to say, because that would take the case out of the prohibition of the statute. As this act was passed in the same year as the act for the suppression of the chantries, there is reason to suspect that it was directed against an anticipated evasion of the act by leases to spiritual persons. Another measure with that object passed after the suppression of religious houses.

(b) Upon this act it was held, in the reign of Elizabeth, that two churches whose revenues are not sufficient to maintain their respective charges, may be united and consolidated by the ordinary, with the assent of the patrons, if it be afterwards confirmed by the king, although their value be above £8 (*Austin v. Twyne*, *Cro. Eliz.*, 500, citing *Year-Books* 6 Henry VII., p. 14, 11 Henry VII., fol. 6); for the statute, it was said, is only in the *affirmative*, and that it never takes away the common law; and at the common law the ordinaries by assent of the patron, without the king's confirmation, might have made a union of churches which were poor, but not of churches which had sufficient to serve the cure, each of them by itself, without the king's confirmation; but by the consent of the king, patron and ordinary, a union may be made of any churches, of whatever value; and this authority is not taken

¹ Sect. 7, 8.

or sell for profit any kind of merchandise, upon pain of forfeiting the thing so bargained, and of the contract being void; with an exception where they sell the overplus that remains of any corn, cattle, or the like, after the supply of their families. No spiritual person is to keep a tan or brewhouse, under the penalty of forfeiting £10 per month.¹

These regulations were designed to remove the clergy from mean and gainful occupations, and to fix their attention solely to their spiritual calling. That this might be discharged with faithfulness, the next step was to put pluralities and non-residence under some restraint. Repeated provisions had been made by councils, and by our own provincial synods, to prevent plurality of benefices; but the force of these had been weakened by the interposition of papal dispensations.² In confirmation of the design of such provisions, and to shorten the hand of the pope, it was now enacted, that if any one having a benefice with cure of £8 per annum, or above, accept of another with cure, and be instituted and inducted, the first shall be adjudged vacant, and the patron entitled to present. All dispensations from Rome or elsewhere, contrary to this act, are declared void, and the procurers thereof subject to the penalty of £20. Only such spiritual men as are of the king's council may purchase a dispensation to hold three benefices; and the following persons to hold two: the chaplains of the king, queen, prince, or princess, or any of the king's children, brothers, uncles, or aunts; of all lords spiritual and temporal, and peeresses; the chaplains to the chancellor,

away by the statute. The court heard arguments of canonists upon the question; and it was agreed by them that, by the canon law the ordinary, with the patron's assent, might have made a union of two churches, although either of them were worth £100 per annum, and sufficient to maintain a minister of itself, and this by the express test of the canon law; for a union may be made for divers causes—poverty of the people, or paucity of the parishioners, or the like. And such a union might have been made without the pope's confirmation. And if a union had been unlawfully made, yet that being afterwards confirmed by the pope, it was forever good and valid; *and such authority as the pope had the queen now hath by the statutes.* It was urged, indeed, that the poverty pretended was a pretence; but the court said, that the validity of the union should be disputed in the spiritual court; and as a union, in such case, might be made at convocation, it was not restrained by the statute.

¹ Sect. 32.

² Lynd., lib. iii., tit. 5, c. 2. Ayl. Parerg. Jur. Can., 414.

treasurer, and comptroller, secretary of state, dean of the chapel, almoner, master of the rolls, the chief-justice of the king's bench, the warden of the cinque ports; as also the brothers and sons of temporal lords and knights, doctors and bachelors of divinity and law, being admitted such by the university, and not by grace only.

The papal canon law and our own constitutions had not been more strict on the article of pluralities than that of residence; but the interposition of the legislature was deemed as necessary in the latter case as in the former. The present statute directs, that every one promoted to an archdeaconry, deanery, or dignity, in any cathedral or collegiate church, or beneficed with a parsonage or vicarage (a),

(a) It was held upon the statute of non-residence, 21 Henry VIII., c. xiii., that a vicar in a cathedral church is not a vicar in fact; and therefore, if he had a benefice with cure of souls or dignity elsewhere, he ought to be resident *there*, under the penalty contained in the statute; for he ought to be resident on one of his benefices, and the vicar of a cathedral was not such a vicar as the statute intended. But it was otherwise of the vicar of a parochial church; for a prebend is a benefice, and therefore, if he has another benefice, and is resident upon the prebend, that sufficeth to excuse him; for the statute was, that he shall be resident upon one of his benefices; and *quære* if a layman who is a prebend ought to be resident, for the statute says, every *spiritual* person (27 Hen. VIII., fol. 10). In the 27th of the king — i. e., six years after the act passed — the judges held clearly, that where a vicar of St. Paul's, or such as had not any vicarage, but was called a vicar in some cathedral church, had another benefice with cure of souls, that he ought to be resident upon his said benefice, or otherwise he would be within the forfeiture of the statute; for he could not reside in the place where he was vicar as described — for he was not vicar in fact, but only in name, for he had not cure of souls in that vicarage, though, if he had, he could reside there. But it was otherwise, it was said, of a prebendary: for he could dwell upon his prebend, since it was expressed in the statute, notwithstanding that he had another benefice (27 Hen. VIII., fol. 11). And note (adds the reporter, that they said secretly among themselves (*que ils partout secretment enter eux*) that an abbot or prior ought to be resident in no other place (i. e., than the abbey or convent), and not in his grange or other place; and if he did so, then that he would incur a forfeiture under the statute. "*Quod nota*," adds the reporter, with a sarcastic significance not unworthy of remark; for such straws show the way of the stream. It was held that the first benefice became void by acceptance of another under this statute, although the incumbent had dispensation from the pope, as it was void by the act; and that although afterwards a dispensation should be purchased of the king, under the subsequent act, 28 Henry VIII., yet the party should not be restored without a new presentment, notwithstanding that the statute made the bulls of the pope good for a year, and that the court of augmentation could make dispensation; but Dyer dissented, for in his view, as the 21 Henry VIII. made the benefice void, so the 28 Henry VIII. restored it (*Weston's Case*, *Dyer's Reps.*, 8 *Eliz.*, fol. 90). It was held that, if there were a parsonage house, the incumbent must reside in it, but that, if there were none, he must still reside in the parish (*Wilkinson v. Colley*, 5 *Burr.*, 2694).

shall be personally resident on one of them at least; and if he absent himself for one month together, or two months at several times in one year, he shall forfeit £10 for every default, with a penalty on those who procured dispensations from Rome, as in the case of pluralities: a similar exception was made in favor of the following persons: those in the king's service beyond sea; scholars residing at any university for study; chaplains to the king or any of the royal family, and lords spiritual and temporal and peeresses; the chaplain of the chancellor; treasurer of England; the chamberlain and steward of the household, treasurer, and comptroller; knights of the garter; chief-justice of the king's bench (and by statute 25 Henry VIII., c. 16, all the judges of that court, and of the common pleas, the chancellor and chief-baron of the exchequer, and the attorney and solicitor-general; and by statute 33 Henry VIII., c. 28, the chancellor of the duchy of Lancaster,¹ and the groom of the stole); warden of the ports; master of the rolls; secretary; dean of the chapel; almoner; such chaplains being attending and dwelling without fraud or covin in the households of the above personages. The following persons were also excepted, being in those days usually ecclesiastics: the master of the rolls; dean of the arches; the chancellor or commissary of any bishop; such of the twelve masters in chancery, and twelve advocates of the arches, as were spiritual men. The king is permitted to give license of non-residence to his chaplains, which seems to be only a confirmation of the common law, for the king's clerks were never bound to residence, and there was an old writ *de non residentiâ clerici regis*.²

There was a clause that forbid a beneficed person taking a parsonage or vicarage in farm, or any profit or rent out of it, upon pain of forfeiting 40s. for every week, and ten times the value of the profit or rent; and the like penalty of 40s. for every week that he

¹ By the same act this privilege was given to some great officers of the courts erected since the former acts, namely, the chancellor of the court of augmentations, the chancellor of the court of first-fruits and tenths; the master of the wards and liveries; each of the general surveyors of the king's lands; the treasurer of the court of augmentations. The chaplains of persons mentioned in this act were to go twice a year to their benefice, and there reside eight days, or forfeit forty shillings for every neglect.

² *Vide ante*.

received any stipend or salary to sing for a departed soul.¹

The temporal lords were earnest in passing these three bills, and the spirituality as strongly opposed them. It was said, that complaints of abuses and pretended reformations were set on foot only to disgrace the clergy, and were the ordinary beginnings of heresy. The clergy without doors were equally clamorous against them; while the acts were, on the other hand, secretly promoted by the king.

Though the latter statute affected the pope's authority in matter of pluralities, non-residence, and dispensations; yet this, and the whole of these three acts were rather regulations of a domestic nature, than such as could be considered in the light of attacks on the papal jurisdiction. However, they showed the pope what the king meant to do, if he went on to offend him, and how readily the parliament would give their concurrence. The clergy suffered a severe blow by these laws; for they not only felt an immediate restraint, and lost a present profit, but a door was opened for the many mortifying regulations which soon followed.²

These begun to appear in two years; for, after stat. 23 Henry VIII., c. 9, which provided against citing any person out of the diocese where he resided (*a*), except in cases of prerogative-administration in the archbishop's court, and in cases of heresy, the foundation of the breach that afterwards followed with the see of Rome was laid, by an act for restraining the payment of first-fruits to that court, upon the accession to any bishopric. This act is chap. 20 of the same statute. It was thereby provided, that

(*a*) Under this act it was held, in the reign of James I., that the Archbishop of Canterbury could not hold a court in any diocese, and cite men thereto, even though not out of that diocese; for that it was an infringement upon the diocesan jurisdiction of the ordinary, and deprived subjects of their right of appeal, and put them sometimes to practical inconvenience by drawing them to a greater distance than they would have to travel if cited in the court of the ordinary. And it was said that the supposed convenient jurisdiction formerly exercised in that way by the Archbishop of Canterbury had been as *legatus natus* to the pope (for the Archbishop of York had never claimed it), and therefore that it had ceased, being abrogated with the pope; and if it were permitted, it would enable the archbishop to erect a court of audience in every diocese, and call all causes from the ordinaries (*Doctor James' Case, Hobart's Repts.*, p. 17).

¹ Sect. 30.

² Burn. Ref., vol. i., 80.

if any bishop presented to the pope was delayed on the above or any other account from his bishopric, he should be consecrated by the archbishop, and if an archbishop, by two bishops, and then installed, in the same manner and to the same effect as if the pope had concurred. That the court of Rome might have no just cause of complaint, in respect of making out bulls for such bishops and archbishops, they were allowed to pay for them £5 in the hundred of the clear profits of their sees.

The king did not intend that things should be hurried to extremities at once; and this bill was only designed as a temperate measure to bring the pope to terms. It did not therefore receive the royal assent; but was to be held forth as a provisional regulation, till the king had compounded this claim of first-fruits with his holiness, or prevailed upon him entirely to renounce it. In the meantime, the whole conduct and direction of this transaction was to be left to the king, who was empowered to declare, within a certain period, whether this bill should be in force or not. Some months after, on the 9th of July, 1533, the act was finally ratified by letters-patent.

The breach with the see of Rome was much forwarded by stat. 24 Henry VIII., c. 12, against appeals (*a*). It de-

(*a*) It has been already seen that in the previous reigns and in the present the courts of law had recognized appeals to Rome, not only in matters purely spiritual, or then regarded as such, for instance, matrimony, but also in causes of a mixed nature, such as causes testamentary, in which the law allowed the ecclesiastical jurisdiction, although no doubt it was anomalous. As to the latter, it would be of course within the competence of the state, without any interference with the spiritual supremacy of the see of Rome, to withdraw them from ecclesiastical jurisdiction, and thus to withdraw them from the appellate jurisdiction of the see of Rome. And it might admit of argument whether this had not virtually been done by the statutes of *præmunire*; and it had indeed been held that an appeal to Rome on a executorship incurred the penalties of *præmunire* (*Year-Book, Rich. III.*). But there had been no such decision as to matters purely spiritual; and on the contrary, in the course of this reign, only a few years before this statute, a papal bull of dispensation in a case of marriage had been pleaded; and it was argued and allowed by the court that matrimony was a spiritual matter governed by the law of the church, and that therefore the papal bull of dispensation would be effective, and might make a marriage valid which otherwise would be invalid (*Year-Book, 12 Hen. VIII., fol. 6*). This view it is obvious would involve, *a fortiori*, the validity of a decree or decision of the see of Rome on an appeal from the ecclesiastical courts of this country; and in the previous reign such a decree, even in a testamentary cause, appears to have been recognized (*Sandes' Case, Year-Book, Hen. VII.*). It has been seen in the history of previous reigns that the common law, as declared by the courts, asserted their right to prohibit the spiritual courts from intermeddling in any matter which was deemed to involve the rights and pre-

clares, in maintenance of the ancient law of the land, and the statutes¹ often made to support it, that all causes testamentary, causes of matrimony, divorces, rights of tithes, oblations, and obventions, shall be heard and finally determined within the king's jurisdiction and authority, and not elsewhere, notwithstanding any inhibitions, appeals, or other process, from the see of Rome, or elsewhere; and it is declared, that all sacraments and religious ceremonies shall be performed, notwithstanding any excommunication or interdict that might be issued.² The penalty of a præmunire was denounced on those who sued at Rome in defiance of the regulations of this act. The order of appeal was directed to be in the following manner: From the archdeacon or his official to the bishop; from the bishop or his commissary to the archbishop of the province (a); from the archdeacon of an archbishop to the

rogatives of the crown, which itself was a matter the courts claimed to determine. It has also been seen that any matter which was mixed up with what was temporal was deemed to involve the rights of the crown, with two apparent exceptions, matrimony and testament; and that in consequence, as advowsons or presentations to churches was considered temporal, they were deemed to be of temporal cognizance, and to belong entirely to the cognizance of the king's courts of law. It has been seen further that, in accordance with the principles thus declared by the king's judges as part of the common law of the realm, parliament had passed a series of statutes designed to carry them out even beyond the letter of the law. The statute of provision of benefices virtually proscribed the exercise of the power of papal patronage, which, as has been shown, the common law recognized; and the statutes of præmunire rendered penal any attempt to enforce the jurisdiction of the spiritual courts over matters which might be determined according to the common law in the king's courts, or to draw out of the realm the cognizance of cases which could be determined within the realm. And, as has already been mentioned, an opinion had been thrown out in the reign of Edward IV. that this prohibited parties from carrying to Rome even spiritual matters which could be determined in the courts of this country (*Year-Book, Edw. V.*). But this could not have applied to appeals to Rome in matters spiritual, because as long as the papal supremacy continued to be recognized by the law, such appeals could not be determined according to law in any court in this country (*Year-Book, 20 Hen. VI., 25; F. N. B. B., 64*); and it is to be observed that the statute abolishing the papal supremacy — the 25 Henry VIII. — was some years later than this act abolishing appeals to Rome. The main mode of asserting the supremacy was by the exercise of the appellate jurisdiction; and while the former existed, the latter must, until expressly abolished, also exist; on the other hand, when the former was abolished, the latter must have ceased without this statute.

(a) Lessee of a parson brought ejectment to recover the lands, and the defendant pleaded that the parson was deprived; to which the plaintiff re-

¹ Meaning the statutes of Edward I. and III., those of Richard II. and Henry IV. against foreign jurisdiction. *Vide* vols. ii., iii.

² Sect. 2.

court of arches or audience; and from thence to the archbishop himself; all these respective appeals were to be within fifteen days after judgment or sentence, and such as were before the archbishop were to be determined without appeal. It was further added, that all causes of the above kind, in which the king had any interest, should, if any appeal was brought by the party grieved, be finally determined by the spiritual prelates and other abbots and priors of the upper house, assembled by the king's writ in convocation: a provision which had a view to the king's divorce then depending. There is added, a saving of all prerogatives heretofore enjoyed by the Archbishop of Canterbury in all cases of appeal.

At length, in the 25th year of this king,¹ the pope's authority was totally destroyed by three statutes, ch. 19, 20, 21 (a); for c. 14 of this statute, which repealed stat. 2

plied that the parson had appealed to the Archbishop of Canterbury in the prerogative court of the arches. The words of the statute being, "to the archbishop of the province," it was objected that the mention of the particular court was erroneous, especially as it appeared that the court of the arches was not the prerogative court. But it was held that this was not material, as the essential matter was the appeal to the archbishop (*Dyer's Reps.*, fol. 60, 7 *Eliz.*). Mention is made, it will be observed, of appeal to the delegates. In the 10 Elizabeth, a case occurred in which the question of ecclesiastical appeals was raised in this way. The deanery of Wells was dissolved by parliament, and a new deanery erected, to which the possession of the prebend of C. was annexed; and by the act it was provided that the king should make a new dean, and that the dean should make demises, as the ancient deans had done. The king made one Goodman dean, who took a prebend in the same church, for which the bishop, by commission of visitation, deprived him, for taking of two dignities in the same church contrary to the canon of the civil law; which was affirmed on appeal to the Archbishop of Canterbury; upon which he appealed to Queen Mary. And by commissioners delegates the deprivation was disallowed; and upon that he made demises, which were affirmed by the bishop and the chapter; and since then, by another appeal to the commissioners delegates, he had been removed, and the other dean restored, who would have avoided the leases; upon which an issue was raised, whether Goodman was dean at the time of the making of the leases, and it was found that he was, on which the leases were held good. And it was also agreed that a deanery is a spiritual promotion, and not temporal; and that by the interest the bishop took under the act, he was not bound in his spiritual jurisdiction, but only in his temporal patronage (*Dyer*, 70).

(a) It is conceived that the author hardly expressed the scope of these statutes, which was not merely to destroy the pope's authority, but to establish the king's, that is, to substitute the royal supremacy for the papal; that is to say, a spiritual supremacy, for the pope's had only been spiritual, and the courts of law and parliament always declared the effect of these statutes was to transfer that spiritual supremacy to the crown. The papal supremacy

¹ An. 1534.

Henry IV., c. 15, and confirmed stat. 5 Richard II., stat. 2, c. 5, and 2 Henry V., stat. 1, c. 7, concerning the punishing of heretics, had another object; except in one clause, which declares it shall not be heresy to speak against the see of Rome, as some ignorant people imagined

was exercised only in matters purely spiritual, except in matters of testament and matrimony; as to which, the anomaly, if there was one, was owing to the law of England, which made these matters subjects of ecclesiastical jurisdiction, and thus indirectly, by way of appeal, sent them to the see of Rome. For the papal jurisdiction was exercised only in these ways: in the approval of the elections of bishops, in the appointment of bishops or incumbents by way of provision, and in the exercise of an appellate jurisdiction on matters always purely spiritual, with the exceptions already mentioned. For instance, the fitness of a presentee for an incumbency, or the sufficiency of the cause of his rejection by the bishop, would be a spiritual matter, and would go to the see of Rome by appeal; for it might raise the question of heresy, which was always admitted to be, and obviously must from its own nature be, essentially a spiritual matter. There were other powers incidental to the papal supremacy, and always admitted by the law of England to be referable to the see of Rome, as excommunications, dispensations, and appropriations. Although the law of England chose to attach certain temporal incidents to excommunication (as incapacity for suing, liability to arrest for contumacy, etc.), it was always admitted to be in its own nature purely spiritual, for it was the deprivation of spiritual privileges. So as to dispensations, or the removal of spiritual disabilities. So as to appropriations, or the perpetual annexation of the incumbency itself (as apart from the mere patronage) to a particular person and his successors. This, it was said, was a spiritual act, and so it required ordinarily the assent of the bishop. But the pope could do it without his assent. The general principle was laid down by the courts of law in the redresses in a case, in which their judgment affords the best possible exposition of the scope of these statutes. That which the ordinary of the diocese might do, the same was used to be done within the realm by the pope, as supreme ordinary, who claimed to himself a supreme jurisdiction above all ordinaries, and long suffered to be done by him; so that he used to make visitations, corrections, dispensations, and tolerations within any diocese of the realm, as the ordinaries used to do; and he took from the bishops of the realm whatever he pleased. And so every appropriation made by the pope alone without the ordinary was taken to be good. And the pope used to make provisions, until he was restrained by the statutes, a provision being a designation of the person who should be incumbent, and an admission, institution, and induction of him without going to the bishop; so that his authority was looked upon as absolute, and bound the bishop as his inferior in all his acts (*Grendon v. Bishop of Lincoln*, *Plowden's Repts.*, 498). All pretensions on the part of the church to control, it has been seen, was early in the reign, and the king had openly asserted his *temporal* jurisdiction over the clergy as well as the laity (*Keilway*, 185), and had provided in several statutes, the last of which had recently been passed, to destroy privilege of sanctuary or of clergy in the cases of the worser crimes. All therefore that could be done to destroy the papal authority in the country, and assert the king's temporal sovereignty, had been done, and nothing more remained to be done except to transfer to the crown the spiritual supremacy heretofore exercised by the papacy. And this was accordingly done by these statutes.

it was. "However, some restraint was by that act imposed on the arbitrary proceedings of the spiritual courts in cases of heresy; and, as it so far put an effectual limitation on the ecclesiastical power, this act must be considered as favorable to the Reformation."¹

The first of those three laws above mentioned is the *sub-*
Submission of
the clergy. *mission of the clergy*, then sitting in convocation; and it was now to be passed in parliament. The clergy thereby acknowledged that all convocations had been, and ought to be, summoned by the king's writ; and they promised, *in verbo sacerdotii*, that they would never make nor execute any new canons or constitutions without the royal assent to them. As many canons had been received which were found prejudicial to the king's prerogative, contrary to the laws, and heavy to the subject, it was ordained that a committee should be appointed of thirty-two persons, sixteen of the two houses, and as many of the clergy, to be named by the king, who should make inquiry and have full power to abrogate and confirm such canons as they thought it expedient, with the king's assent (*a*). Appeals to Rome were once more condemned by parliament, and all appeals are directed to be made according to stat. 24 Henry VIII., c. 12, just mentioned; only an appeal is by this act given from the archbishop's court, and from places exempt, to the king in chancery (*b*);

(*a*) It would perhaps have been as well if the author had mentioned, even in a note, that the submission of the clergy, that is, their virtual disclaimer of the papal supremacy (which was implied in their admission of the right to make canons without the assent of the see of Rome) was obtained by coercion and intimidation, by means of their condemnation in the penalties of a *præmunire* for acknowledgment of the legatine jurisdiction, a condemnation which put them in the king's mercy, and involved forfeiture of all they had, and liability to perpetual imprisonment.

(*b*) This statute must be construed with reference to the previous act of 24 Henry VIII., c. xii. By stat. 9, however, of that act, in case any such cause should touch the king, the appeal from any of the said courts was to be made to the upper house of convocation. But by the *present* statute, as held to be laid, there was a general prohibition that no appeal shall be pursued out of the realm to Rome or elsewhere. It was a general clause that all manner of appeals, what matter soever they concern, shall be made in such manner within the realm as is ordered by the 24 Henry VIII., in the three causes aforesaid, and one further degree in appeals for all manner of causes is given, viz., from the archbishop's court to the king in his chancery, where a commission shall be accorded for the determination of the appeal, and from thence no further (4 *Inst.*, 340). One of the most frequent and important causes of ecclesiastical litigation was where a bishop had ex-

¹ Burn. Ref., vol. i., 142.

upon which a commission is to be directed to such persons as the king shall name, as in cases of appeals from the

amined a clerk presented to a benefice, and refused to admit him, rejecting him for insufficiency. If the cause of refusal was traversed in *quare impedit*, it was tried by the metropolitan, while the party refused remained above (*Specot's Case*, 5 *Coke's Reps.*, 57). The clerk refused by the bishop may also have a remedy against him in the spiritual court—denominated a *duplex querela*, which is a complaint in the nature of an appeal from the ordinary to his next immediate superior, as from a bishop to the archbishop, or from an archbishop to the delegates; and if the superior court adjudges the cause of refusal to be insufficient, it will grant institution to the appellant (3 *Bla. Comm.*, by *Coleridge*, p. 247). The first case under the statute arose not long after it—the case of Goodman, reported in Dyer's Reports (*Wilson v. Pollard*, 3 *Dyer*, 273). The appointment to a deanery having been vested by statute in the crown, Edward VI. appointed Goodman. Afterwards the bishop, under the authority of the king, deprived him. He appealed to the archbishop, and the sentence was confirmed. He appealed further to the king in chancery, and delegates were appointed under the above statute, who heard the case and confirmed the sentence. Thereupon the king appointed one Turner, who was installed. But on the accession of Mary, she issued a fresh commission of delegates to review the sentence of the former delegates; and they revised it, and Goodman was restored. Queen Elizabeth, however, issued another commission of delegates, who reviewed this latter sentence and confirmed the former one. Questions arose as to the validity of the acts of the rival deans, and the court of law upheld the legal force and effect of all the sentences of the successive commissions of delegates appointed under the statute, holding each effective so long as it continued in force. Upon this it was held that the king might grant a commission of review, though the 24 and 25 Henry VIII., c. xix., says the sentence of the delegates shall be final (*Gervis v. Hellawell*, *Cro. Eliz.*, 571). There a sentence had passed against the plaintiff in the spiritual court, and he appealed to the arches, where the sentence was affirmed, and adjudged against him, whereupon he sued a commission to the delegates, and the matter was re-examined, and sentence was then given for the plaintiff. And thereupon another commission was sued forth to examine the matter, and a prohibition was prayed to stay it, for it was said that by stat. 25 Henry VIII., c. xix., it was appointed that a sentence before the delegates shall be final; and then the second commission was not well awarded. But it was said that the queen had by law an absolute power to grant commissions of review to re-examine, which was not restrained by the statute 25 Henry VIII., and it was so held, and said that it had often been so held before these times (*Ibid.*)—a decision involving a most important and potent principle of wide application. In modern acts (2 and 3 *Will. IV.*, c. xcii.; and 3 and 4 *Will. IV.*, c. xli., s. 3), the judicial committee of the Privy Council was substituted for the commission of delegates under the old statute. And by those acts, all the powers of the high courts of delegates, both in ecclesiastical and maritime causes, were transferred to the king in council, and the judicial committee of the Privy Council was established—by which, in reality, all such appeals were to be determined. And, accordingly, such ecclesiastical cases, whether as to testamentary matters or otherwise, have since been so heard and determined (*Dyke v. Wulford*, 5 *Moore's P. C. Cases*, 424). And so of an appeal from the archbishop's court on a *duplex querela*, that is, an appeal by a clerk who has been rejected by the bishop. The appeal is to the Privy Council (*Gorham v. Bishop of Exeter*, 15 *Q. B. Reps.*, 52).

admiral's court. This court of appeal has been since called the *Court of Delegates*.

Till the reformation of the ecclesiastical law was made, it was declared, that such canons, constitutions, ordinances, and synodals provincial, being already made, and not repugnant to the laws, statutes, and customs of the realm, nor to the hurt of the king's prerogative, should be used and executed as before:¹ upon which saving, and the former usage of the kingdom, depends the present practice of the ecclesiastical courts; as the designed reformation of that law has never been effected. We shall, however, have occasion hereafter to make some observations on the steps taken for bringing about this reformation.

The second of these acts is chap. 20, which confirms the former statute concerning the non-payment of first-fruits: and further enacts, that bishops shall no longer be presented to the see of Rome, nor shall sue out any more bulls there; but that all bishops should be presented to the archbishop, and an archbishop to the other archbishop, or to any four bishops whom the king should name. When any see is vacant, the king is to grant a license, or *congé d'élire*, to the dean and chapter to proceed to a new election (a),

(a) The statute 25 Henry VIII., c. xx., recited the 23 Henry VIII., c. xx., which had provided that no one presented as bishop by the king to the pope should be delayed, etc.; and in sec. 3, speaks of election, presentation, investment, and consecration, but not to confirmation; and the sec. 4 prescribed the mode of election by the dean and chapter on a *congé d'élire* from the crown, with a letter-missive containing the name of the person they are to elect; and they are to elect that person and none other; and if they do not do so in twelve days, the crown was empowered to nominate by letters-patent. By sec. 5, the archbishop was directed to confirm the election, and invest and consecrate, etc.; but if the dean and chapter elected the person named in the letter-missive within the twelve days, their election was to stand good and effectual. And by sec. 7, the dean and chapter were to be liable to præmunire if they did not proceed to election, and signify the same "according to the tenor of the act," which they could only do by electing the person named in the letter-missive; and the same penalty was provided against the archbishop or bishop if he did not confirm, invest, and consecrate, within twenty days of the signification to him by the letters-patent; and against any persons who should do or maintain anything contrary to the due execution of the act. This act was revived by 1 Eliz., c. i. And the 20 Henry VIII., c. i. (repealed by 1 and 2 Philip and Mary, c. viii., and re-enacted by 1 Eliz., c. i.), asserted the supremacy of the crown in the strongest terms. It is very remarkable that even under Mary, the principle of the royal supremacy, even in this fundamental and vital point of the appointment of bishops, was asserted and exercised practically as strongly as by her father, Henry VIII. For in a case in a subsequent reign, it appeared that

¹ Sect. 7.

and therewith to send a letter-missive containing the name of the person whom they are to elect; and if they delay

Mary, in the first year of her reign, by letters-patent to a dean and chapter signified that she had appointed and elected to the bishopric, and directed them to elect him; and he was elected and returned accordingly, and had a patent to be consecrated, and all things done for his consecration and restitution of his temporalities and otherwise, as was requisite to make him a perfect bishop; and that he being so bishop, was so until the reign of Elizabeth, when he died (*O'Brien v. Knivon, Cro. Jac.*, fol. 552). Before that case came before the court, the reigns of Edward VI. and Elizabeth had intervened, as well as that of Mary. And by the 1 Edward VI., c. ii., it was declared that as "the elections were in very deed no elections, but only by a writ of *congé d'élire*, hence colors and shadows of elections, serving, nevertheless, to no purpose, and seeming also derogatory and prejudicial to the king's prerogative, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics." That statute was indeed repealed by the 1 Mary, c. ii., but, as has been truly observed, afforded a nearly contemporary exposition of the statute 25 Henry VIII., c. xx. And although that act was not repealed under Mary, yet she practically acted upon the same principle. And the 1 Elizabeth, c. i., which renewed the statute 25 Henry VIII., c. xx., appears by us so to have been passed for the repressing of the pope's usurped power, and the restoring of the rights, jurisdictions, and pre-eminences appertaining to the imperial crown of the realm; and it in substance re-enacted the 25 Henry VIII., c. xx., giving the crown virtually the power of appointing the bishops. Sec. 4 enacted that at every avoidance of an archbishopric or bishopric, the king may grant a license to the dean and chapter to proceed to election with a letter-missive, containing the name of the person they shall elect and choose; by virtue of which license they shall, with all speed, in due form elect and choose the person named in the letters-missive, and none other. If they delay above twelve days, the king may nominate and present by letters-patent; and every such nomination, if to the office of bishop, shall be made to the archbishop; and by sec. 5, he is to invest and consecrate with all speed; and if the dean and chapter, within twenty days, elect and choose the person named in the letters-patent, their election shall stand good (1 *Eliz.*, c. i.). The repeal of this statute by the statute of Edward VI., was itself repealed by the statute 1 Elizabeth, and the present system of appointment of bishops restored. And, accordingly, the great expounder of our modern ecclesiastical law, Gibson, states it as clear law, that, practically, in appointments to the episcopate, the crown is absolute. In Gibson's "*Codex*," p. 109, where the statute 25 Henry V., c. xx., is set out, there is a note to the words, "letter-missive,"—"The only choice the electors have, under this restraint, is, whether they will obey the king, or incur a *præmunire*." And further, in a note to the words, "in due form," he says, "The election, from beginning to end, proceeds, *seemingly*, upon the *congé d'élire*, without any appearance of restraint from the letters-missive, and in the same manner as if there were no such restraint; and the only circumstance remarkable in it is, the solemn declaring of the person elected to the clergy and people assembled in the church, wherein we see the *footsteps* of the more ancient way of electing, and of the part which they had in the election (*Codex*, p. 109)." And the whole weight of the authorities amply attest this view; and notwithstanding some weak attempts to make objections to the royal nominees to the episcopate, they have all failed. Thus Bishop Burnet, indeed, gives an account of the election of Parker, not quite consistent with the statute (*Hist. Reg.*, vol. ii., p. 68); but the new practice then had not been settled. Burn (*Burn's Eccl. Law*, p. 207) gives

the election for twelve days, the king is to nominate by letters-patent. The person elected or nominated is to swear fealty to the king, and a commission is to issue for consecrating and investing him; after this he is to do homage to the king, and to be put in possession of the spiritualities and temporalities. The dean and chapter, or the bishop or archbishop, neglecting for twenty days to perform their parts, as prescribed by this act, are subjected to the penalty of a *præmunire*.

Next follows the famous act for discharging the subject from all dependence on the papal see.¹ The preamble

from Collier's "Ecclesiastical History," vol. ii., p. 745, the account of the confirmation of Bishop Montague, in the face of an objection made by the Puritan party, and although, it is true, the vicar-general, in refusing to receive the protest, took refuge in some defects of form, — and Burn says that he admitted the opposition to be good had it been legally offered. There is no authority for this, and neither Gibson, Godolphin, nor Ayliffe refer to the case as a precedent. On a later occasion, in the cases of Bishops Parker and Cartwright, Archbishop Sancroft at first promised to defer consecration until he had examined into certain charges; but upon hearing that this would subject him to a *præmunire*, he consented to consecrate (*Burnet's Hist. of His Own Times*, vol. iii., p. 137). And in a MS. work of Sir James Marriott, queen's advocate in 1764, and afterwards judge in the admiralty court, entitled "Book of Practice," the following passage occurs: "Confirmation must be despatched within twenty days, otherwise a *præmunire* is incurred. Therefore there needs no citation of opposers, nor are they to be heard if they offer" (*Marriott's Book of Practice*, in MS. in the library of Trinity Hall, Cambridge, cited in the argument in *The Queen v. The Archbishop of Canterbury*, 11 Q. B. Reps., 519). It may be observed, that as to the elections of deans and chapters, on the old foundation, they remained as they were before, under particular charters of ancient date. Mr. Hargrave states the deans of the old foundations to be in the same position as the bishops, and declares that both are now in the sole nomination of the crown. But this has been well said is matter of fact rather than of law, for it must depend a good deal on the charters of foundation. He appears to assume that the king was founder and patron of all the old deaneries, and that they were all affected by the charter; but he does not suggest how such a change was effected. The act 25 Henry VIII., c. xx., which provided so plainly as to elections or rather nominations of bishops, makes no allusion to elections or appointments of deans, nor is any other act on the subject to be discovered. The fact appears to be, that for more than two centuries the chapters have elected on the recommendation of the crown, but still the chapters have elected; and it has been held in our own time, that their acceptance of the crown's nominees was no proof that they were bound to accept (*The Queen v. The Chapter of Exeter*, 12 N. and G., 534). The court then said, "the form is the same as that of electing a bishop; but an act of parliament was found necessary to enable the crown to appoint a bishop, in case the dean and chapter refused to elect him whom the crown recommended." So that it seems established by judicial decision, that the power of the crown in the appointments to the episcopate depends entirely upon the express words of statutes.

¹ Chap. 21.

complains of the intolerable exactions for Peter-pence, pensions, impositions, and bulls, which were contrary to the laws of the kingdom, and grounded on the usurpations and abuses of the pope in granting dispensations; whereas it stood, says the act, with natural equity and reason, that the king and parliament only should have power to dispense with laws, or to authorize some elect person to exercise that supreme authority (a). And forasmuch as the Convocation had recognized the king as supreme head of the Church of England, therefore it was enacted, that all payments made to the apostolic chamber, and all papal provisions, bulls, and dispensations, should from thenceforth cease; and, for the future, all dispensations or licenses for things not contrary to God's law, but only to the law of the land, should be granted within the

Papal authority
abolished.

(a) The papal dispensations had been always recognized in the courts of law, and had been so recognized a few years before this act. Thus, in the twelfth year of the reign, a case occurred in which a party suing on a contract for a marriage (*si lex ecclesiastica permittet*), but which, it appeared, had become inadmissible, according to ordinary ecclesiastical law (on the ground of affinity), set up a papal bull of dispensation to remove the disability. The other party demurred, not on the ground that the papal bull was not recognized by the law, but on the ground that the contract was to be understood to have reference to the state of the law at the time the contract was entered into; and that, at the time of the death of the first son, the law of the church did not permit the second to marry the espoused wife of the other; and that, as to the bull or letters of dispensation, it did not affect the question, for *lex ecclesiastica non permittit*, as the law of the church, was otherwise. On the other side, it was argued that, although the marriage would not have been lawful at the first, yet it had been made lawful by the license. To this it was upheld that the bull, or letters of dispensation, implied that the law of the church was otherwise, but that it did not belong to the courts of law to determine the effect of the license. That seems to have been the view of the court (12 Hen. VIII., fol. 6), though the report ends with an adjournment, and the decision does not appear. But it is observable that it was laid down that the law of marriage was spiritual, and that the courts of this country could not enter into the question of the effect of papal dispensations, and that it was to be left to the ecclesiastical courts, thereby impliedly recognizing the validity of such a dispensation. So long as the papal supremacy continued to be recognized by the law, it would have been impossible not to recognize the papal dispensations, along with papal appropriations, and papal excommunications, and papal appellate jurisdiction, and all the other acts by which the spiritual supremacy was exercised. It need hardly be said that the see of Rome at no period claimed to dispense with the temporal laws of the country, or, if it ever had done so, the pretension had never been allowed in the courts of law, for it was always a maxim in our courts that "the pope could not alter the law of the land." (See the introductory note to this chapter.) The papal power of dispensation only applied to the laws of the church, as disabilities to marriage, or to hold benefices, etc. The necessity for some such power appears to have been recognized by parliament in this very statute, which proceeded to give it to the king.

realm; that is, by the Archbishop of Canterbury, who is to grant them, in such cases as had been formerly used (a): and further, all dispensations which used to be taxed at Rome at or above £4 were to be confirmed under the great seal. When the archbishop refused to grant such dispensations, the party might have a writ out of chancery for him to show cause for his refusal; upon which his reasons were to be examined, and justice done in the case.¹ There is a clause in this act which declares, that it was not intended to decline from the catholic faith of Christendom.² The exemptions of monasteries was confirmed; and they

(a) It was held that this statute only transferred the authority of the Bishop of Rome to the archbishop, and did not interfere with the king's prerogative at common law (*Armeger v. Holland, Cro. Eliz.*, 542). The question arose in that case thus: A parson was created a bishop, and had the queen's license, by letters-patent, to hold his parsonage *in commendam*. Afterwards she presented some one else, who was indicted and sued for tithes, upon which the party sued applied for prohibition, and on the part of the queen's presentee it was contended that her dispensation was not sufficient, as the statute appointed how a dispensation was to be obtained, viz., by grant of the archbishop, confirmed by the great seal. The court, however, held that the statute only transferred the authority of the Bishop of Rome to the archbishop, but the king, by his prerogative at common law, might have granted such a dispensation, which was not taken away by the statute; and, as the queen had the prerogative, she might dispense with her own act (*Armeger v. Holland, Cro. Eliz.*, 542). In the reign of James I. a great case arose upon the effect of this part of the statute, which indirectly raised the still greater question, whether the effect of all these statutes was to vest in the crown or the archbishop, under it, all the powers formerly exercised by the pope, or only to a certain extent; and the decision given involved the latter proposition. It was a case of *commendam*, by dispensation of the archbishop, and the question was, whether it was good; and the majority of the judges held that it was *not*. The question, it was said, turned upon this statute, and it was not doubted that, before the separation from Rome, the pope could have granted the dispensation, because he was recognized by the law as head of the established church. But it was denied that whatever the pope did *de facto*, the same should be allowed by this statute to the archbishop; but it must be restrained to such acts as he could do lawfully. And it was said that, looking at the statute 28 Henry VIII., c. xvi., s. 1, it must be taken that the pope's power in the realm was limited by law, and, further, that the power of the archbishop under this statute must be taken to be limited by the common law or other statutes *in pari materia*, and therefore, by the statute 21 Henry VIII. against pluralities of benefices; and that this was to be inferred from the statute itself, as sect. 21 abolished all licenses, etc., made at Rome, contrary to the provisions of the laws and statutes of the realm. The king, it was said, never meant to allow dispensations against the common law, however the pope might have practised some such. And this, it was said, was manifest from 25 Henry VIII., c. xiv., which inveighed against papal proceedings contrary to the laws of the realm, and 25 Henry VIII., c. xix., which banished all provincial canons of the same kind (*Coll v. Bishop of Lichfield, Hobart's Reps.*, 148).

¹ Sect. 17.

² *Ibid.*, 19.

were declared not to be subject to any visitation from the archbishop; but they were brought under the king's jurisdiction, who might grant a commission to visit them (a). Power was given to the king and council to reform all indulgences and privileges which had been granted by the see of Rome. The offenders against this act were subjected to a præmunire.

This law, by cutting off the trade of indulgences about divine laws, which had been so gainful to the church, gave great ease to the people. Not only the pope's power was hereby rooted out, but the religious houses now saw themselves within the king's power (b). This was aggrandized still more by the authority this act gave him of abrogating all its provisions by his letters-patent, if he so pleased.

But the king's supremacy was not directly established by parliament till the following year, when it was enacted by stat. 26 Henry VIII., c. 1, that the king shall be taken as "the only supreme head in earth of the Church of England, called *Anglicana Ecclesia*; and shall have all authority thereto annexed, to reform and correct all errors, heresies, and abuses, which may be amended by any spiritual jurisdiction whatsoever" (c).

(a) There is strong reason to suspect that this was the real object of the act, and the author himself observes immediately afterwards, "The religious houses now saw themselves within the king's power;" and he goes on to notice, in the next page, the act 27 Henry VIII., c. xxviii., abolishing all the lesser monasteries. This could not have been done without a papal bull of dissolution and dispensation, according to the old law. And a few years previously the king had himself ratified the papal bull of dispensation procured by Wolsey for abolishing and dissolving certain small houses.

(b) And, as the author goes on to mention, within two years the 27 Henry VIII., c. xxviii., passed to abolish the lesser houses.

(c) These statutes transferred to the crown the pope's spiritual supremacy. That this was their scope and effect was undoubtedly understood at the time, and repeatedly declared by courts of law. If it were not so, More and Fisher need never have died; and it is idle to suppose that More, who had been chancellor, did not know the real meaning of the law against which he protested unto death. But the judicial decisions and declarations of the courts of law place the matter beyond a doubt. In the next reign, in the case already cited, the court declared, "And such authority as the pope used to exercise within this realm was acknowledged by the parliament in 25 Henry VIII. and other statutes to be in Henry VIII. So that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within the realm. So that he, *being supreme authority*, might make an appropriation of his own authority and jurisdiction without the bishop; and so the next king did, inserting in his charter the words, 'by our royal authority, supreme and ecclesiastical,' which the judges held to be good.

When the king had been invested with this entire sovereignty over the church, it seemed like bringing

And other like acts of jurisdiction and authority he might do which the Bishop of Rome was used to do in the realm, inasmuch as the king was head of the Church of England" (*Grendon v. The Bishop of Lincoln, Plowden's Reps.*, 498). The same doctrine was maintained by the king and his successors, and acquiesced in by parliament, and declared by the courts of law in the succeeding reigns. It is manifest, therefore, that the scope of these statutes was not merely to destroy the pope's authority, but to transfer it to the king, and that the prerogative of the royal supremacy involved — as indeed the very use of the phrase implied — something quite distinct from sovereignty, that is, a spiritual supremacy, seeing that everything short of that had already been guaranteed to the crown by common law or statute. And accordingly, in point of fact, the crown asserted and exercised from this time until the Rebellion an absolute spiritual supremacy, except so far as restrained by parliamentary enactment, — these enactments, however, dictated by the crown, and only required for the purpose of enforcing the supremacy by temporal powers and penalties. "And it was then also established and enacted, by the authority of that parliament, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual or ecclesiastical, as had heretofore been or might lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, and offences, should forever, by authority of that parliament, be united and annexed to the crown" (*Cawdrey's Case*, 5 *Lord Coke's Reps.*, 33). So, in the case already alluded to as having arisen in the time of Mary, the case of *Bale*, which came before the court in the reign of James I., the court affirmed that the Irish statute — very similar to the English one — which gave authority to the queen and her successors to create bishops by their patents, without *congé d'élire*, did not give any new power, but was only a restitution of the common law, and that the king, before the statute, might create a bishop without any writ of *congé d'élire*, which was but a form or ceremony the kings of the realm had agreed to observe (*O'Brien v. Knivan, Cro. Jac.*, 552). This was no doubt the high prerogative doctrine of the Tudors and the Stuarts; and it was reasserted in the same reign in a case in which it was held that the king, by virtue of the royal supremacy at common law, could make orders and constitutions for the government of the clergy, without the authority of parliament, and deprive them if they disobeyed; so that the crown at common law, according to this doctrine, had all the power the pope ever claimed, and had full power to alter or declare or define faith, morals, and worship; and the authority of parliament was necessary to restrain and not to constitute the prerogative (*Cro. Jac.*, 37). In that case, the very question was whether the deprivation of Puritan ministers by the high commissioners (appointed under the 1 Elizabeth, repealed by 19 Charles I., c. xi.), for refusing to conform themselves to the ceremonies appointed by the last canons, was lawful? Whereto all the judges answered, that they had conferred together, and held it to be lawful, because the king had the supreme ecclesiastical power, which he hath delegated to the commissioners, whereby they had the power of deprivation by the common law of the realm, and the statute 1 Elizabeth c. i. (which appointed commissioners to be made by the queen), doth not confer any new power, but explain and declare the ancient power. And, therefore, they held it clear that the king, without parliament, might make orders and constitutions for the government of the clergy, and might deprive them if they obeyed not.

things only into their old course to give to him the first-fruits and tenths, which had been so lately taken from the pope; this was done by stat. 26 Henry VIII., c. 3. It was in order to promote the good government of the church that the primitive institution of suffragan bishops was provided for by stat. 26 Henry VIII., c. 14. Every bishop was to present two persons to the king, who was to nominate one to be suffragan. The towns to which suffragans were to be appointed, with their duty and privileges, are mentioned in the act.¹

Henry may now be considered as having completed the whole of his plan against the Bishop of Rome; the remaining statutes on this subject being rather in aid of those already passed, than introductory of anything entirely new. By stat. 27 Henry VIII., c. 15, the commission of thirty-two persons to revise the canon law was intended to be maintained. Chap. 28 of the same sessions, for dissolving the lesser monasteries (*a*), may be

(*a*) This subject of the suppression of religious houses is extremely curious, and few are aware what precedents there were, and how gradually the proceeding was carried out to its consummation. It appears that, so far back as the reign of Edward III., the king had seized all the possessions in this country of "priors' aliens" (in consequence of the war with France); and that in the reign of Henry VI. these possessions were given to the king by the authority of parliament, which looks as if doubts existed as to the legality of the seizure. The king, however, held these possessions, and out of them — probably from some compunction of conscience — founded the priory of Shene (*Keilway's Reps.*, 168). The precedent no doubt was remembered; and it is remarkable that in the reign of Henry IV. these changes incited the king to seize the lands of the religious houses, and that in the reign of Edward IV. there were ominous *dicta* in the courts as to whether, when all the monks of a house died, the house was not deemed to be dissolved (*Year-Book, Edw. IV.*). In the earlier part of this reign the authority of the see of Rome had been invoked for the abolition of some of the smaller houses. In the 15 Henry VIII. the pope by bull gave license to Cardinal Wolsey to suppress, extinguish, and dissolve divers monasteries mentioned in the bull, "*Ita quod le cardinal obtineret l'assent le roy*;" and in the 17th year the king (of course) accepting and reciting the bull by letters-patent. Afterwards the prior and convent surrendered their estate to the cardinal, and the king gave him the lands. In the 22d year, however, the cardinal was attainted on a *præmunire*, and the king seized the lands. There can be no doubt that the acts of the 25th and 26th years were passed in a great degree with reference to the religious houses. In the 27th year it was enacted that the king should have all the lesser monasteries, and after that the surrender of most of the greater houses was enforced by terror of death, and by the actual execution of several of the abbots; and lastly, the above mentioned statute, 31 Henry VIII., declared that all the religious houses which have come to, or should come to, the king should be deemed in his legal possession. There was a

¹ *Vide Burn. Ref.*, vol. i., 151.

considered as a continuation of the scheme for humbling the clergy, and seems to have been foreboded by the late acts—that against dispensations, and that to establish the king's supremacy. The monasteries dissolved by this act were those of only £200 per annum and under.

An amendment was made by stat. 28 Henry VIII., c. 13, in the late law of non-residence. Many persons had availed themselves of the privilege allowed to students in the universities, and, under that character, lived there in idleness, instead of residing at their livings. The act declares, that persons above forty years old shall not be entitled to the privilege of that exemption, unless they are some of the heads and governing part of the university or colleges, or readers in divinity. Those under forty years must be such as attend at the ordinary lectures, disputations, and exercises of the place, unless they are readers in some of the liberal sciences.

The last stroke at the papal power seems to have been made by stat. 28 Henry VIII., c. 16, which declares all bulls, briefs, faculties, and dispensations, of what kind soever, heretofore granted from the see of Rome, to be void, and of no effect. As this act was only levelled at the many jurisdictions, privileges, and exemptions that were claimed in different parts of the kingdom under the sanction of papal grants, it was necessary, in order to avoid much confusion, to add provisos to this sweeping clause: there is accordingly a saving of all marriages, appointments of bishops, ordinations, and the like; and further, of all such cases as might legally be dispensed with by the Archbishop of Canterbury; which, however, were to be confirmed under the great seal: so that all these matters, instead of papal authority, would henceforth subsist only by virtue of this statute.

The remaining statutes relating to the Reformation are

curious decision in the reign of Henry VI., that if the king give land in frank-almoigne to find a certain number of monks, and it is found by office that they have not their number, or neglect their divine services, the king shall seize the land (*Year-Book*, 35 Hen. VI., fol. 57, *Case of the Bishop of Winchester v. the Prior of St. John of Jerusalem*). The case was there put of the lands of the Knights Templars, seized by King Edward I., and afterwards granted by the crown, with the authority of parliament, to the Hospitallers, to hold by the same services; and it was said that this did not revive the tenure in frank-almoigne, and that if the lands were lawfully in the king's possession, that tenure was gone.

the following, which may be passed over in a short way, without any great loss to the historical lawyer. By stat. 31 Henry VIII., c. 9, the king was empowered to create bishops by letters-patent; by chap. 13 of the same session, all the remaining monasteries were dissolved; and by chap. 14 was passed the law of the six articles, which, being an ordinance of a very penal nature, will more properly be considered hereafter, as well as some other statutes relating to heretics and offenders on the score of religion. By stat. 32 Henry VIII., c. 26, the king was empowered to appoint a commission of bishops and some clergy to agree on a form of religion for the observance of the whole nation; and by stat. 34 and 35 Henry VIII., c. 1, some provisions were made about Tindal's books; which also being of a penal nature, will come under that division of the statutes of this reign.

Thus have we traced the progress of those measures by which this great revolution in our ecclesiastical polity was effected. The many struggles between the spiritual and temporal jurisdiction, in former periods, had ended most commonly to the advantage of the clergy; but, in this reign, a new light was let in upon the nation, and the people, under the auspices of this spirited prince, were at length delivered from the yoke of blind and implicit obedience. The church was declared an entire and perfect body within itself, with authority to decree and regulate all things without dependence on any foreign power; and the supremacy thereof was annexed to, and united with, the imperial crown of the realm; so that a way was opened for all that followed in the next reign, to complete the reformation of religion. In the meantime, the ecclesiastical courts continued to possess all the detail of jurisdiction which they exercised in former times, except that they now had before their eyes the injunction of the late statute, to abstain from such doctrines as were repugnant to the law, statutes, and customs of the realm, and the king's prerogative.

Before we take leave of ecclesiastical matters, it will be proper to notice what alterations were made by parliament respecting some articles which were of a spiritual concern; these are, marriage, the collecting of first-fruits and tenths, and the payment of tithes.

It had been the ancient custom of the chancery, that

the six clerks, cursitors, and all others, except the clerk of the crown, should be unmarried, being originally all real clerks; and upon their marriage, they forfeited their places. This custom had gone out of use as to all except the six clerks, who were still bound to the old rule. There was therefore an act made on purpose, namely, stat. 14 and 15 Henry VIII., c. 8, to enable them to marry, without prejudice of forfeiture. The clergy, who had the entire government of the ecclesiastical courts till this reign, had preserved the rule there inviolate, and they allowed no person who was lay or married to exercise any ecclesiastical jurisdiction: but now, when all spiritual jurisdiction was declared to flow from the crown, as supreme head, and it was rather wished that the administration of justice there should not be in the hands of persons entirely devoted to the church, it was enacted, by stat. 37 Henry VIII., c. 17, that all persons, as well lay as married, being doctors of the civil law, might be chancellor, vicar-general, commissary, official, scribe, or register, and exercise all jurisdiction ecclesiastical, as any others, being spiritual persons, might do.

The other statutes concerning marriage regard pre-contracts, and the degrees within which persons might marry (*a*). When Henry had married Anna Boleyn, and

(*a*) The statute 2 and 3 Edward VI., c. xxiii., enacts, that as concerning pre-contracts, the former statute should be repealed, and be reduced to the state and order of the king's ecclesiastical law of the realm. This, therefore, is the proper place in which to notice what the law was upon this most important subject. In the first place, although according to the spiritual law of the ancient Catholic Church a marriage by words of present contract, followed by consummation, would amount to a marriage, on the theological principle of the church that marriage was a sacrament which the *parties* administered, and of which the essence was mutual consent and actual consummation, yet it should seem that by the ecclesiastical law, as allowed in this country from the earliest times, the presence of a priest was required to constitute a legal marriage; and that even by the ecclesiastical law, it was necessary in order to constitute a regular marriage. This is the Saxon law ecclesiastical; and there is one which directed that at the marriage a mass-priest should be present, who should bind the union (*Wilkin's Concilia*, 367). At all events, if it was not so by the Saxon ecclesiastical law, it certainly was so settled soon after the Conquest. The council held at Winchester in the time of Archbishop Lanfranc, 1076, contained a constitution that a marriage, without the benediction of a priest, should not be deemed a legitimate marriage, and that the issue of other marriages should be deemed illegitimate (*Johnst. Eccl. Law*, A. D. 1070, fol. 5). The 11th constitution of Archbishop Stratford, established by the council of London: "De celebrantibus matrimonia clandestina in ecclesiis, oratoriis, vel capellis," recited in effect that people left their own places of residence where

the act of succession, stat. 25 Henry VIII., c. 22, was passed to settle the crown upon the descendants of this

the impediments to their marriages were notorious, and the parish priests not disposed to solemnize their marriage, and betook themselves to populous places where they were unknown, in order that "aliquoties in ecclesiis aliquando in capellis seu oratoriis matrimonia inter ipsos de facto solemnizari procurent" (2 *Wilkin's Concilia*, 706; *Johnst. Eccl. Law*, A. D. 1343, fol. 11). It is true that it is laid down in the Decretals, part 4, that a man and woman legally competent to contract matrimony, shall take each other for husband and wife *per verba de presenti*, that they are thereby bound as such; and that if either party contract a second marriage, in the life of the other, it is void, and the parties to the first contract may be compelled to cohabit. And there was a papal decree a century and a half after the ecclesiastical constitution of Archbishop Lanfranc, where this was plainly laid down as the *lex ecclesiæ* (*Decretals*, lib. x., fol. 1, c. 31). It is further to be observed, that what constituted a legitimate marriage was in ancient times deemed to be a matter of spiritual cognizance, and triable by the bishops; though in certain cases, where the temporal rights depended upon it, and the matter would be determinable in the temporal courts, it would be by certificate from the bishop, except in certain cases, where the facts of a marriage would be triable by a jury, as on a question of legitimacy of issue and right to inherit. The law of England always, however, claimed to determine what should be the legal or temporal consequences of matrimony, or what should be the incidents of a marriage which should have such consequences. Hence the statute of Merton as to the effects of a marriage after issue born; and hence the law laid down about the same time in Bracton, as to the effect of matrimony in giving a right to dower, and the kind of marriage which should be considered as conferring it. He lays down the broad proposition, that the offspring of a clandestine marriage are legitimate, but that such a marriage will not entitle the wife to dower *ad ostium ecclesiæ* (*Bracton de Legibus*, tit. iv., fol. 302). The distinction thus clearly and intelligibly laid down would have solved all difficulties and reconciled all the authorities, had it been attended to. And the difference between a private marriage and a public marriage would be so important with reference to this distinction between the spiritual character of the union and its temporal consequences, that it would be perfectly intelligible to leave the former to the law spiritual, but to insist that the latter should be governed by the temporal law, which required publicity. It would be natural and reasonable that those who demanded temporal rights as against others by virtue of marriage, should be required to celebrate it publicly in face of the church, and in the presence of a priest or minister of religion, which would leave a witness to it; and should not attempt to involve others in the consequences of a private one, and chance to inflict loss of property, or even legal penalties, by virtue of an act kept secret. In the "Grand Coutumier" it is stated that if a man and a woman mutually agree to marry, and they have carnal knowledge of each other in pursuance of such consent, the marriage is good, and the issue legitimate (c. xxvii., fol. 46). In the reign of Edward I., indeed, a case occurred which is cited from Lord Hales's MS. in Co. Litt., 334, to the effect that where a man had married a woman *per verba de presenti*, and had issue by her, and afterwards married another woman *in facie ecclesiæ*, the first wife recovered her husband by sentence of the ecclesiastical court, and he afterwards enfeoffed a third party, and then married the first wife *in facie ecclesiæ*, and died, she brought dower against the feoffee and recovered, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage: sed reversatur coram Rege et concilio quia prædictus A. not fuit seisi-

new union, it was thought prudent by every possible means to stigmatize the marriage with Catherine as

tus, during the espousals between him and B. (the first wife). And it is added, *nota*, that neither the contract nor sentence was a marriage. In effect it was proposed to deprive the lord of his apparent right by a purely *private* marriage. The force of this will be more appreciated when it is borne in mind how strong the tendency of the old law was to desire publicity in whatever related to legal transactions, especially as to rights to land. In another case in the same reign, known as De Heith's case, which was substantially the same in its material facts, the same decision was given, and no doubt upon the same grounds; and the concluding words of the record are—"Quæsitum fuit si aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt prædictus Johannes convaluit de prædicta infirmitate dicunt quod non. Et quia convictum est per assisam istum quod prædictus Johannes De Heith nunquam disposavit prædictum Katherinaum in facie ecclesiæ, per quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in prædictis tenementis." There was, it is manifest, a strong distinction between a *mere* contract for marriage not executed and an actual marriage by *present contract* executed or by solemnization. Thus it was laid down on the authority of a case in the Year-Book of Edward III.: "If a contract of marriage lie between a man and a woman, yet one of them may enfeof the other, for yet they are not one person in law" (*i. e.*, by the *mere* contract, which would be for a *future* marriage), "inasmuch as if the woman dieth before the marriage solemnized between them, the man to whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted. But after the marriage celebrated between a man and a woman, the man cannot enfeof the wife, for then they are as one person in law" (*Perkins, title, Feoffments*, fol. 199, citing *Year-Book*, 38 *Edw. III.*, fol. 12). There was a case cited in Rolle's "Abridgment," of the time of Henry VI., in which it was held that a bigamous marriage was void, and that divorce *causa præcontractus* bastardized the issue. "A man who hath a wife takes another wife, and hath issue by her, this issue is bastard by both laws" (*i. e.*, the common law and the ecclesiastical law), "for the second marriage is good" (*Rolle's Abr.*, *F.*, fol. 1). And in the same case it was also laid down that divorce *causa præcontractus* bastardized the issue (*Ibid.*, *G.*, fol. 1, *Year-Book*, 18 *Hen. VI.*, fol. 34). The distinction is obvious, for in the first case an actual lawful marriage is presumed, in the other case only a contract for it, without cohabitation, and therefore a sentence required to bastardize the issue. That pre-contract was a ground for avoiding a marriage was well-settled law. Looked at by the light of this reasonable and intelligible distinction, the authorities of the canon and common law will be found perfectly consistent, although different, the matter being regarded under such *diverso intuitu*. Thus in Lyndwode it was laid down: "Matrimonium sicut alia sacramenta cum honore et reverentia, de die, et ex facie ecclesiæ, non cum risu et joco ac contemptu celebratur. Ne dent sibi fidem mutuo de matrimonio contrahendo nisi in loco celebri coram publicis et pluribus personis ad hoc convocatis" (*Provinciales sive Constitutiones Angliæ*, b. iv., tit. 1, fol. 271, *De Sponsalibus et Matrimonio*), that is, though the presence of a priest is not declared to be essential to the validity of a marriage, *i. e.*, *inter se*, as binding the parties to it, yet it lays down that it is proper and becoming that it should be in the face of the church, openly and publicly. And that which the church considered proper in marriage the law of the land required, in order to give it legal effect and validity as against others. This note, however, goes beyond the *decision*, which, interpreted by the doctrine laid down in Bracton, would be perfectly intelligible

unlawful. Accordingly a clause was inserted,¹ which declared all marriages within the degrees there men-

without that, seeing it was a case of dower, which required a *public* marriage. The judgment by no means implies that the marriage was in no sense valid, *i. e.*, *inter se*, or even as to inheritance and legitimation of issue: therefore that was a temporal incident of the marriage, and might be withheld, without denying the spiritual validity of the marriage. There was another case in the same reign, in which a man was married privately, and died before any public marriage; and the issue born after his death was adjudged bastard, and that the land escheated to the lord without heir (*Foxcroft's Case*, 1 *Rolle's Abr.*, 359). This is a very general note of the case, in an abridgment; and it is impossible to place much reliance on it, the *ground* of decision not being given; but it is enough to say, it was a question of the law of inheritance, and affected third parties. The reader need hardly be reminded that the question of marriage, and especially of the effect of previous marriage, or contract *per verba de presenti*, was a question which proved pregnant with tremendous consequences in this reign. Another is a remarkable passage in the "Memorials of Cranmer" by Strype: "The Lord Cromwell did use to consult with the archbishop on all his ecclesiastical matters, and there happens now a great case of marriage, whom it concerned I cannot tell; but the king was desirous to be resolved about it by the archbishop, and commanded Cromwell to send to him for his judgment thereon, whether a marriage contracted or solemnized in lawful age *per verba de presenti*, and without carnal copulation, be matrimony before God or not? what the woman may thereupon demand by the law civil after the death of her husband? The archbishop, who was a very good civilian as well as divine, but loved to be wary and modest in all his dealings, made this answer: That he and his authors were of opinion that matrimony contracted *per verba de presenti* was perfect matrimony before God, but he knew not what she could demand by the law; for that all manner of causes of dower be judged within this realm by the common law of the same" (*Strype's Memorials of Cranmer*, vol. i., c. xii., p. 45). An answer which appears entirely in accordance with the authorities, and recognized the distinction laid down by Bracton. It has already been mentioned that matrimony had been always regarded by the law as a spiritual matter within the appellate jurisdiction of Rome. And a case occurred in the course of this reign of still greater importance and significance, and having a singular bearing upon the question as to the law of matrimony, and the efficacy of papal dispensations, which formed the turning-point in the ecclesiastical policy of this reign, and resulted in separation from Rome, and a great religious revolution. The case was this. The plaintiff sued on a bond given by the defendant that his son *cique* should marry the daughter of the plaintiff; and that if, before the consummation of the marriage, he should die, then that the son *puise* should marry her, "*si lex ecclesiastica permittet*;" and it appeared that the espousals had taken place, but that, before the marriage was consummated, the first son died; whereupon the plaintiff procured a bull or license of dispensation, and gave notice of it to the defendant, and desired his son to marry the plaintiff's daughter, which he had refused to do. The defendant demurred; and on his behalf it was argued that a contract must be understood to have reference to the state of the law at the time the contract was entered into; and at the time of the death of the first son, the law of the church did not permit the second to marry the espoused wife of the other; and that as to the bull of *dispensation*, it did not affect the question; for *lex ecclesiastica non permittet*, as the law of the church

¹ Sect. 3, 4.

tioned (all of which were both Levitical and canonical, and that with a brother's wife is one) to be unlawful, and that persons so related might be separated by the sentence of the ordinary. When this act was repealed by the second act of succession, stat. 28 Henry VIII., c. 7, and the crown settled in another manner, this same prohibition was re-enacted, as the law of God, which no human power could dispense with. It was, moreover, declared, that the meaning of these prohibitions was, that if it chanced for any man to *know carnally* any woman, then all persons related to such woman within the above degrees, should be adjudged within the prohibition,¹ which was a refinement of the canon law upon this subject, and has been mentioned in a former place.²

The legislature had in this case given parliamentary sanction to the doctrines of the canon law, respecting some of the prohibitions to marriage from consanguinity or affinity; but in stat. 32 Henry VIII., c. 38, they took another course, and made a solemn declaration against the whole of the pontifical law upon this head, and also upon that of pre-contracts. The preamble of that act complains, that upon pretence of former contracts not consummate by carnal copulation, marriages consummated were dissolved and children bastardized: further, that marriage was prohibited by other impediments which had been in-

was otherwise, and the bull was only a dispensation. On the other side it was argued, that though the marriage would not have been lawful at the first, yet it had been made lawful by the license. To which it was replied, that it rather showed that the law of the church was otherwise, and that it did not belong to the courts of law to determine its effect; to which the court appeared to assent (12 *Hen. VIII.*, fol. 6). It appears from this case that the courts regarded marriage as a spiritual matter, regulated by the ecclesiastical law, and that they recognized that, according to ecclesiastical law, a papal bull of dispensation might remove a disability to marriage, but left its effect to be determined by the ecclesiastical courts. The scope of this statute was to confine it to those courts.

¹ Sect. 11, 12. The degrees of marriage prohibited by this act are these: "The son to marry his mother or stepmother carnally known by his father; the brother his sister; the father his son's daughter or his daughter's daughter; the son to marry the daughter of his father procreated and born of his stepmother; the son to marry his aunt, being his father's or mother's sister; to marry his uncle's wife, carnally known by his uncle; the father to marry his son's wife, carnally known by his son; the brother to marry his brother's wife, carnally known by his brother; any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister."

² *Vide ante.*

vented only to be dispensed with; as kindred or affinity between cousins-german, and so to the fourth and fifth degree;¹ carnal knowledge of any of the same kin or affinity before in such outward degrees: all which the act pronounces to be contrary to God's law, and tending to great scandal, as persons were continually hunting after some pre-contract, kindred and alliance, or carnal knowledge, to make void a marriage that they were tired of. To correct this, it was now declared by stat. 32 Henry VIII., c. 38, that all marriages contracted between lawful persons, that is, persons not prohibited by God's law to marry, being solemnized in the face of the church, and consummate with bodily knowledge, or fruit of children, shall be judged good and indissoluble, notwithstanding any pre-contract not consummate with bodily knowledge. It was moreover declared, that no prohibition, God's law excepted, should impeach any marriage without the Levitical degrees. Considering what had passed before, the provision in this act against pre-contracts is very remarkable, and at that time gave occasion to much censure upon the proceedings against Anna Boleyn; for that which was now so much condemned, was then made the pretence for dissolving the marriage with her. Some endeavored to reconcile this inconsistency by a wish in the king, indirectly to take away the impediment to the succession of her daughter Elizabeth. The other branch of the statute was to make way for the king's marriage with Catherine Howard, who was cousin-german to Anna Boleyn; this being one of the prohibited degrees by the canon law, but not by the Levitical degrees. The preamble states, as a reason for the act, that "what sparks remained of the papal legislation might kindle hereafter a great flame; and, at least, while they remained,

¹ There seems to have been a variety in the canon law upon this point. By a constitution of Archbishop Lanfranc, none was to marry his own kin, or that of a deceased wife, or the widow of a deceased kinsman, within the seventh degree. He rests this on a decree of Gregory the Great; but that pope, in his prescript to St. Augusta, allowed marriage in any degree beyond the fourth. A decree of that pope, to the effect Lanfranc intimates, is to be found in the *Decretum*; but is by later canonists pronounced to be an error of Gratian.* There is a canon which allows those in the fifth degree to marry, and forbids those in the fourth to be separated, if married; this canon is attributed to Theodore of Canterbury.†

* Caus. 35, Quæst. II. and III., c. 16; and Johnson's *Canons*.

† *Ibid.*, c. 20; also *vide ante*.

might show that the pope's power was not entirely extinct."

When first-fruits and tenths of spiritual preferments were given to the crown, by stat. 26 Henry VIII., c. 3, several regulations were made for the due payment and ordering of this new revenue. These were succeeded by many other provisions, as ch. 17 of the same statute; stat. 27 Henry VIII., c. 8; 28 Henry VIII., c. 11; 32 Henry VIII., c. 22 and 34; 35 Henry VIII., c. 17, all which go into a particular detail of arrangement, much of which has been superseded by later statutes, and on that account, as well as the minuteness of the subject, is little worthy of attention.

It was endeavored to render the payment of tithes more regular, by assisting the ecclesiastical process. By stat. 27 Henry VIII., c. 20, if any one disobeyed the
Tithes. process of the spiritual court, and the ordinary made application to one of the king's council, or to two justices of the peace, they have power to commit the party, till he find security to obey the sentence of the court. It was again enacted, by stat. 32 Henry VIII., c. 7, that all persons shall duly set out their tithes and offerings (a);

(a) This was one of the statutes which arose out of the dissolution of religious houses. Before these statutes there was no legal remedy provided for laymen for recovery of tithes. The cause of the dissolution of monasteries in the 27 Henry VIII. (laymen taking small occasions to withhold their tithes), was the occasion of the making of the statute 27 Hen. VIII., c. iv. The principal cause of the making of the statute of 32 Henry VIII., c. vii., was to enable laymen that had estates, or interests in parsonages or vicarages, inappropriate or otherwise in tithes, to sue for subtraction of tithes in the ecclesiastical courts, and to provide that no person should be sued or compelled to pay tithes for any lands which by law were discharged of tithes. And the act 2 Edward VI. was made in addition to these statutes. Lord Coke observes, that by the 28 Henry VIII., bulls, etc., should be void, and there is no exception of bills of discharge from tithes; and he adds, that he is of opinion that the pope by his bulls could not discharge any subject of payment of tithes. The common law recognized that the tithes were in their nature spiritual, and that the liability to tithes was a matter for the cognizance of the spiritual courts. Hence in the reign of Edward IV., in an action by a vicar for taking corn, etc., the defendant setting up the right of the parson to take the tithes, and the vicar setting up his right to them by prescription, it was admitted that if the question had arisen between two parsons, then the court of law would have had no jurisdiction, for the suit would be in the spiritual court; but it was otherwise, it was said, when the question was between parson and vicar, as in this case; so if the action was against a farmer of the parson, the suit could be in the spiritual court, and so the court of law would be ousted (6 *Edw. VI.*, fol. 3). It was laid down, however, that where the right to tithes came in dispute, the court of law had no

and if they omit, they may be convened in the spiritual court, and ordered to pay costs; and two justices may, as in the former case, commit the party to gaol, till he give security to perform the definitive sentence. As tithes, and other spiritual dues, since the dissolution of monasteries, had come more into lay hands than before, it was thought proper to give the like common-law remedies as were in use for lay fees. It was therefore ordained, that any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profits in lay hands, might become a subject of controversy, in a *præcipe quodd reddat, assize of novel disseisin, mortuancestor, quodd id deforceat*, writ of dower, and other writs original, as the case might require; and that fines and other common law assurances might be made of them. But it was provided, that suits for subtraction of tithes or offerings should still be in the ecclesiastical court, as before.¹ By stat. 37 Henry VIII., c. 12, a number of regulations were devised respecting the payment of tithes in London. It seems a decree had been made by the Archbishop of Canterbury, the Chancellor Audley, and others of the council, to settle a course for the due payment of tithes in the city: upon this there issued letters-patent, and a proclamation directed to the citizens to enforce the execution of it; and by stat 27 Henry VIII., c. 21, all tithes and dues were directed to be paid in pursuance of this decree, until further order should be made

power to hold plea, for it appertained to the spiritual law, and prescription on that law and at common law differed, for at common law it must be from time immemorial, but by the spiritual law, twenty or forty years would be a prescription in regard to tithes (*Ibid.*). Tithes, after severance, are lay chattels vested in the parson, and if the party detain them, he may sue either by the common or ecclesiastical law (*Leigh v. Wood, Cro. Eliz.*, 607). As against the party himself who sets forth his tithes a suit is maintainable in the spiritual court, if he detains them, although the parson might have a remedy at the common law, but if a stranger takes them after they were set forth, the remedy was only at common law; and it was said that this was shown by the words of the present act, "If any do not set out, or do detain, or withhold tithes" (which, it was said, meant *after* they be set out), "he shall be sued in the court Christian;" for otherwise mischief would ensue to the parson, in that he would secretly set his tithes forth, so as the parson should not know thereof, and would afterwards carry them away (*Ibid.*). The object of the statute, to compel the party to set out his tithes, was there to give the parson a legal right. The object was carried out also by a statute of Edward VI. These statutes, like so many others, followed indirectly from the great measures of the reign as to the church, etc.

¹ Sect. 7.

therein by the king and the thirty-two persons who were to be employed in reforming the ecclesiastical law. After this, several disputes arose on the construction of this decree; and the parsons and citizens had agreed to submit their differences to the archbishop, the chancellor Wriothesley, and several others of the council: these parsons made another decree, which is inserted in the present act, and is thereby required to be observed.

Such was the history of this famous revolution in our ecclesiastical polity. Having disposed of this, we are at liberty to proceed to the provisions which were made for the better ordering of the civil state. Of these, the first regard is due to a regulation for marshalling the higher ranks of society according to their respective dignities. We have hitherto met with no example in our statute-book of any direction upon this head. The first is by stat. 31 Henry VIII., c. 10, "for placing of the lords." It was a part of the king's prerogative to give such honor, reputation, and place to his councillors, and others, his subjects, as seemed best to his wisdom; and such prerogative is asserted in these very words in the preamble of this statute; but the king was content that order should now be taken in his high court of parliament for ascertaining the degrees of precedence. It was therefore enacted, that no person, except the king's children, should sit at any side of the cloth of state in the parliament chamber, whether the king was present or not. And because, says the act, the king is supreme head in earth of the Church of England; and for the good exercise of the said most royal dignity and office, he had appointed Thomas Lord Cromwell his vicegerent; he and all persons having that office should be placed on the right side of the parliament chamber, on the same form with the Archbishop of Canterbury, and before him, and should always have voice to assent or dissent, as the lords of parliament.¹ Next to him was the Archbishop of Canterbury, then York, then London, Durham, Winchester, and then the other bishops; all on the same side, according to their

¹ The appointment of Cromwell was entirely upon principles of economical regulation. We have seen what was the office of *vicar-general*, and that he might be appointed by bishops or popes. Considering the king's present title of head of the English church, his vicar-general could not but be placed before the Archbishop of Canterbury. *Vide ante*.

ancienties, as had been accustomed. It seems that no order had before been made for assigning any place to the following officers in respect of their offices; but they were now placed in this way: The lord chancellor, lord treasurer, lord president of the king's council, the lord privy-seal, being of the degree of barons or above, were to sit on the left side of the parliament chamber, on the higher part of the form, above all dukes, except such as were the king's son, brother, uncle, nephew, or brothers' or sisters' sons: the great chamberlain, the constable, the marshal, the lord admiral. The great master, or lord steward, and the king's chamberlain, were to sit in this order: after the lord privy-seal, above all persons of the same state or degree; the king's chief secretary, being a baron, was to sit above all barons; and if a bishop, before all bishops, not having any of the before-mentioned offices. All dukes, not before mentioned, marquisses, earls, viscounts, and barons, not having such offices, were to be placed according to their ancienty, as had been accustomed. If the lord chancellor, lord treasurer, lord president of the king's council, lord privy-seal, or chief secretary, were under the degree of a baron, they were to be placed at the uppermost part of the sacks, in the midst of the parliament chamber, either there to sit on one form, or upon the uppermost sack, in the order before mentioned.

This order of precedence was to take place not only in the parliament chamber, but also in the trials of peers; and in the star-chamber, and other assemblies of council, the chancellor, treasurer, president, privy-seal, the great chamberlain, the constable, marshal, lord admiral, grand master, or lord steward, the king's chamberlain and chief secretary, were to observe the rank hereby given.

We proceed now from the highest to the lowest; from the different degrees of honor, to the various descriptions of poverty and wretchedness. We have seen what regulations had been made in former reigns for the suppression of beggars and vagabonds (a).¹ The increase of these

(a) And the present measure was one of the same class and character, and belongs rather to the category of measures for the suppression of vagrancy and vagabondage than measures for the purpose of making a provision for the poor. The only portion of it which in the least relates to that subject is that which allows of licenses to the aged and impotent to beg; and that is

¹ *Vide* vol. iii.

evils is evidenced by various statutes made in this reign for the correction of them. It has been a favorite opinion, that the provision for the poor had never become an object of necessity till the abolition of religious houses had deprived many persons of a support from the donations there regularly made; but the first statute we shall mention was passed before that event (*a*), and is nothing more

introduced merely as a kind of saving or exception of those classes of the poor from the cruel penal provisions of the bill. The author, therefore, was entirely in error in describing this as a poor-law measure; it was neither more nor less than a severe penal measure against vagrancy. The former measures on that subject had probably arisen, as has already been shown, from the system of villenage, and the natural tendency of the idler class of villeins to depart from their lords, and wander about the country. This is the most charitable explanation of the extreme severity of the present measure, though it is difficult to conceive the necessity for any further measure after the stringent measure of last reign. Villenage, no doubt, still subsisted, though fast declining and dying out, in a great degree through the departure of the villeins from their lords and masters. There was a case in this reign which shows that even ecclesiastical persons still retained their villeins; for it was there decided that if a villein came to one as executor to a bishop or parson *in jure ecclesiæ*, and acquired land, the executor could not have it *jure proprio*, but as executor, and it should be part of the assets of the estate; and if the bishop or parson took the land, he should have it *in jure ecclesiæ*; for that they could not have the villein himself *in jure proprio*, but *in jure ecclesiæ* (*Bro. Abr., Villenage*, fol. 46; 32 *Hen. VIII.*). Naturally enough men would wander away when they could from such a state of bondage, and prefer a vagrant liberty to a condition of serfdom. And this would naturally annoy their lords, and stimulate severe measures against them. And that such was the scope of the present measure is clear from its penal character, and its resemblance to the similar measure of last reign. There is, however, reason to suspect that it was not really required for ordinary vagrants, and that it had a deeper and a worse object.

(*a*) The author had forgotten that this act was after the dissolution of many of the lesser religious houses in the 15th year; and though it was before the general dissolution of religious houses, it was after the king had begun to design it, and after he had already plundered the clergy, by means of the terrors of *præmunire*, under pretence of their having obeyed the authority of a papal legate licensed by himself; and, moreover, it was after he had forced them to acknowledge him as supreme head of the church. Moreover, it was after he had resolved upon the dissolution of his marriage with Catherine, and after the friars (who were mendicants) had preached against these measures. The author had forgotten that the friars were mendicants, and might be called vagrants; and that the present statute was in reality directed against them is the more probable because there was a similar statute directed against the monks after the dissolution of religious houses. And by the stat. 27 Henry VIII., c. xxv., after the dissolution, a beggar or vagabond was the first time to be whipped; and if he continued his vagrant life, he was to have the upper part of the gristle of his right ear cut off; and if after that he was taken wandering in idleness, or was not in service with anybody, he was to be adjudged and executed as a felon. It may, it is believed, be safely said that this was the first time in the history of this or any other country in which not only beggary or vagrancy were made capital

than a continuance of the policy which had been begun many years before. It was enacted, by stat. 22 Henry VIII., c. 12, that justices of the peace, mayors, sheriffs, bailiffs, and other officers of counties, cities, and towns, should divide themselves, and make diligent search within their divisions for all aged, poor, and impotent persons, who were of necessity compelled to live by alms; and such persons they were to authorize to beg within a certain hundred, city, town, parish, or other limit, as it should seem best to them in their discretion. The names of such persons were to be put in a roll, a copy to be certified to the justices in sessions, and a letter was to be delivered to such beggars, under seal, signifying they had authority to beg. Any person begging without such license, and beyond his limit, was to be whipped, or set in the stocks three days and three nights, during which he was to be kept on bread and water. This was to be by order of a justice or high constable, who was after that to limit him a place where he might beg, and give him a license.

The poor laws.

Thus far of impotent persons. It was further provided, that if any person *being whole and mighty in body*, and able to labor, was taken begging, or vagrant, and could give no reckoning how he lawfully got his living, he might be brought before a justice of peace, high constable, mayor, or other officer of the place, who might direct him to be whipped out of the place at the end of a cart, till his body was bloody: and he was to take an oath to return to the place where he was born, or where he last dwelt before the punishment for the space of three years, and there labor as a true man ought to do. He was to have a letter testifying the time and place of his punishment, whither he was going, and what time was limited for such journey, within which time he was permitted to beg by the way. As often as he violated the terms of this letter he was to be whipped, till he arrived at the appointed place and betook himself to labor. If the

felonies, but the absence of regular employment (which might, it is obvious, be no fault of the party) was made punishable with death! And there was a similar measure under Edward VI., and that, Burnet distinctly states, was directed against the vagrant monks. There is, therefore, every reason to believe that this was directed against the mendicant friars, who had preached against the king's marriage.

person so whipped was idle, and no common beggar, he was to give security, should the officer think proper, for repairing to his place of birth or residence as before mentioned.

To secure the execution of this regulation, justices of the peace were, in their session, to inquire of the defaults of towns in suffering begging, and impose fines on the inhabitants.

But no provision was made for the treatment of vagrants when they arrived at the place of settlement, nor for charging the inhabitants with the maintenance of the poor and impotent, or setting to work the valiant vagabonds. To remedy this, it was ordained by stat. 27 Henry VIII., c. 25, that the public officers of such places should take order for the reception and support of such as were unable to labor, and for the putting to work such as were, under penalty of forty shillings for every month they should neglect. For this purpose they were to gather alms with boxes every Sunday, holiday, and other festival, or otherwise among themselves. All persons passed away in the above manner were allowed at every ten miles to call on the constable of the place to provide them meat, drink, and lodging for one night.

Such public officers were to take up all children in every parish within their limits under fourteen and above five years of age, that were found begging and in idleness, and appoint them to masters of husbandry, or other crafts or labors, to be taught, and so be enabled to get their living; and they were to give them some of the charitable contributions to equip them for such service. Such as refused to go to service, or who departed from it without reasonable cause, being above twelve and under sixteen years, were to be publicly whipped.

Once in every month the above public officers were to cause privy search to be made, by night or by day, as they thought proper, for vagabonds and suspected persons, and all persons were to assist in such search. Those found a second time in a state of vagrancy were not only to be whipped, but to have the upper part of the gristle of the right ear clean cut off; which was to be performed by the constable, with the assistance of a substantial inhabitant of the parish. For a third offence he was to be committed to prison by a justice, and then indicted for wandering

and loitering; and if found guilty, he was to suffer death as a felon and enemy of the commonwealth.

All common doles were forbid, and no person was to give alms in that or any other way, but only to the common boxes and gatherings before directed to be made. Bodies corporate, who by their institution were to distribute alms out of their revenue, were now required to give it, at the usual times, in money to such common boxes and gatherings (*a*). The churchwardens in every parish, calling to them six or four of their honest neighbors, had authority once a quarter to call such collector before them to give an account of money collected, and in what manner it was employed: and if any was embezzled or misapplied, he was to be committed to prison by a justice, mayor, or other officer of the place, till he restored the said sum. An account of all such receipts and disbursements was to be kept yearly by the minister or some other honest man of the parish; the book to be in the custody of the constables and churchwardens, two or three of them, or some other indifferent man, and not the minister. There was a penalty of twenty shillings upon parishes that neglected to promote public collections. The act contains several other clauses, some of which were designed for turning the course of private charities, whether of monasteries or well-disposed persons, to these public boxes and gatherings; some were to save mendicant friars from incurring the penalties inflicted on beggars (*b*), and religious persons from any restraint on giving to poor almsmen established in their houses, or to casual travellers, or to shipwrecked mariners, or other distressed objects; in short, that they might give alms in such manner as would not encourage common begging and vagrancy.

Such were the regulations made in the reign of this king for the disposal of beggars and vagrants. These seemed particularly to deserve our attention, because they contain the outline of the more enlarged system for the government of the poor, which was so much improved

(*a*) This was the only part of the measure which at all partook of the character of a provision for the poor, and, it will be observed, that it merely authorized a control over the existing system of voluntary alms.

(*b*) These clauses show that they would, but for such clauses, come under the penal provisions of the act, and the saving clauses were extremely inadequate.

in the next reigns, and finally settled in that of Elizabeth (*a*).

The laws made in this reign relating to the other branches of the inferior orders of society, the laboring part, such as *journeymen*, *apprentices* (*b*), *artificers*, need not engage so much of our time; because most of them were not of a general import, but were calculated for particular trades and employments under particular circumstances. The wages of servants in husbandry, artificers, and laborers, were prescribed by stat. 6 Henry VIII., c. 3; a penalty was imposed on those who took more (*c*); the hours of work and of meals were also settled. No master was to compel his apprentice to engage by oath or bond not to open a shop. The exaction of high fees for the admission of apprentices to their freedom was guarded against.¹ These, with various other provisions of a more partial nature, were made by parliament.

(*a*) This could only be true of the latter part of the measure, which was of a limited character, auxiliary to the main object—the punishment of vagrancy.

(*b*) These laws had begun in this reign, and was followed by similar laws in the subsequent reigns. As to apprentices, there were a score of acts, beginning with one in the last reign, either compelling masters to take apprentices, or restricting them to a certain number. Thus by an act of last reign the worsted manufacturers were to take apprentices so as not to have above two at a time (12 *Hen. VII.*, c. i.). So in the next reign, which was but a continuance of this, none were to make corslets, etc., but those who had served apprenticeships (5 and 6 *Edw. VI.*, c. xxiv.). And again in the reign of Mary, there was a similar law as to weavers (2 *P. and M.*, c. xi.). And there were many such statutes in the reign of Elizabeth. Such statutes as to apprentices have long been obsolete, and it is observable that some of the regulations they introduced were similar in character to such as have been enforced in our own times by trades-unions. As to artificers, etc., the statutes passed in this and the next reigns (as that of 2 and 3 *Edw. VI.*, c. xv., against artificers conspiring to raise wages), formed the original of a long series of statutes on such subjects, which have been continued to our own time.

(*c*) These attempts to regulate the rate of wages by authority of statute, though persisted in during the subsequent reign, have long been discontinued. The attempt in this statute was to fix them in the statute itself without any provision for change; the effect of which of course would be that, as the comparative value of money declined (as at this time it was declining), the wages fixed would become by degrees totally inadequate. There had been a statute in the last reign fixing the rate of wages for servants in husbandry at about £1 a year with diet and clothing; and as to common artificers 4d. a day with diet, and 6d. without. This indicates the importance of prices of food as an element in the question of wages, and the necessity for statutable enactments on that subject if there were to be any on the other. And accordingly in this reign there was an act fixing the price of meal at a halfpenny per lb. (24 and 25 *Hen. VIII.*). In subsequent

¹ Stat. 28 *Hen. VIII.*, c. 5.

Numberless are the provisions made in this king's reign for the protection and advancement of domestic trade and manufactures. Instead of ^{Of trade.} encouraging foreigners, as heretofore, it was now endeavored to collect all mercantile employment into the hands of natural-born subjects. Upon this principle various obstructions were placed in the way of foreigners who carried on any trade; and regulations were devised for better qualifying the rising generation. By stat. 14 and 15 Henry VIII., c. 2, no stranger born out of the king's obedience, whether denizen or not, and using any handicraft, was to have any apprentice, nor more than two journeymen, unless natural-born subjects. Strangers and their wares were to be subject to the inspection of the wardens and fellowships of handicrafts in the city. Upon a petition of the tradesmen of London complaining of foreign artificers, a decree was made in the Star Chamber in 20 Henry VIII., and was confirmed by stat. 21 Henry VIII., c. 16. By this, among other things, it was directed, that no stranger artificer should have more than two stranger servants; but being a householder, he might have as many English servants and apprentices as he pleased. Those not being householders, nor keeping a shop at the time of the act, were forbid to keep any house, shop, or chamber, to exercise their craft or mystery, which was only a revival of a regulation made in the reign of Richard III.¹ This provision was again renewed by stat. 32 Henry VIII., c. 16, which likewise makes void all leases of a dwelling-house or shop to any stranger artificer not being a denizen; nor was such a person thenceforward to take any lease on pain of forfeiture; and both lessor and lessee was to pay a hundred shillings. It is remarkable among these jealous provisions against strangers, it was over and over ordained, that such persons, not being denizens, should be bound by all the laws and statutes of the realm.

reigns it was provided that the justices should yearly fix the rate of wages (5 *Eliz.*, c. iv.; 1 *James I.*, c. vi.). And these statutes got rid no doubt of the difficulty and absurdity of a fixed uniform rate, remaining the same without reference to price. And there were similar statutable rules to fix the price of beer (23 *Hen. VIII.*, c. iv.). So of bread, etc. The assize of bread remained until a much later age. But as the statutes for fixing prices became obsolete, statutes for fixing wages in like manner became so.

¹ Stat. 1 Rich. III., c. 9.

Among the laws respecting trade may be reckoned several statutes for regulating the dress of all ranks of persons; these were frequently repealed and new ones made, as experience successively demonstrated the difficulty of subjecting such matters to parliamentary restrictions.¹

Many other statutes were made for the conducting of different manufactures (*a*), of which, as well as of the other acts of this and the following reigns, it may be observed in general, that they had a tendency to give preferences to corporations and fraternities, and to encourage a spirit of monopoly.

The policy set on foot in the last reign, of turning the attention of farmers from pasturage to agriculture, was promoted by several statutes in this reign. If any one suffered a house of husbandry to go to decay, or converted tillage into pasture, the immediate lord of the fee was entitled to seize a moiety of the offender's land till the offence was reformed.²

Before we enter upon the laws relating to private property, we shall briefly speak of one or two provisions that principally respected tenures (*b*). The abuses probably

(*a*) These statutes were in pursuance of many similar measures passed in previous reigns, and of others in subsequent reigns; for such measures continued to be passed until after the Stuart revolution, and marked the ancient policy as to trade and manufacture which may be called coercive. The general tenor and character of these measures was the same. Searchers were to be appointed in particular trades, to see if the articles were properly made, and such as were not so were to be seized and forfeited. Thus it was provided in an act of the last reign as to brass wares (19 *Hen. VII.*, c. vii.), was now in like manner provided as to brass, tin, or pewter (4 *Hen. VIII.*, c. vii.; 25 *Hen. VIII.*, c. ix.; 32 *Hen. VIII.*, c. iv.); so as to leather (27 *Hen. VIII.*, c. xiv.; 5 and 6 *Edw. VI.*, c. iii.; 1 *Mary*, c. viii.; 18 *Eliz.*, c. ix.; 1 *James I.*, c. xxii.); so as to cloths (5 and 6 *Edw. VI.*, c. vi.; 39 *Eliz.*, c. xx.; 10 *Anne*, c. xvi.; 1 *Geo. I.*, c. xvii.); and so coopers' casks (23 *Hen. VIII.*, c. iv.); so of coachmakers' wares (1 *James I.*, c. xxii.); so of many other trades and manufactures.

(*b*) The author omitted to explain the connection between inquest or inquisition of office and the subject of feudal tenures. They were connected in this way, that, as a general rule, the king or lord was only entitled to lands, the property of which came to him by escheat or forfeiture, or the custody of which came to him by wardship, by means of such inquest, inquisitions, or inquiries of office, as they were called (whence the phrase "office found"), before the sheriff, escheator, or other proper officer for taking such inquiries. Even in cases where the king was in a certain sense entitled without office found, as where the cause of forfeiture itself was a ward, as an

¹ Stat. 6 *Hen. VIII.*, c. 1; 7 *Hen. VIII.*, c. 6; 24 *Hen. VIII.*, c. 13.

² Stat. 7 *Hen. VIII.*, c. 1, and *vide stat.* 25 *Hen. VIII.*, c. 13.

introduced under the late administration of Empson and Dudley, made it necessary to add to the number of those acts that had already been passed Escheators. for the taking of inquisitions by escheators and commissioners.¹ The complaint now was, that sometimes untrue offices were found, sometimes offices were changed, and sometimes such were returned as had never been found. To remedy this it was enacted, in the first year of this reign,² that no escheator or commissioner should return an inquisition or office concerning lands or hereditaments, unless found or presented by twelve men, under their seals, and indented, under penalty of £100. All escheators and commissioners were to have lands of forty marks per annum. Inquisitions were to be taken in an open place, according to the statutes, and every one was to be at liberty to give evidence openly before the inquest. The jurors

attainer or conviction for treason or felony, still an inquiry might be necessary to ascertain what the lands were to which the king was to be entitled. Then there were inquisitions as for forfeitures by outlawries. The greater number of these inquisitions, however, were connected with the subject of tenures. Thus the king was entitled to have in ward or guardianship all the lands of which the tenant died seized, and what they were must be found (21 *Hen. VI.*, fol. 11). One or two cases will illustrate the nature and use of an "office," or inquiry by reason of an office. If the king grant any land to another without title, I can enter or have an assize; and so if the escheator enter to the use of the king; *contra*, if office should be found and the king then grant it over (*Year-Book*, 35 *Hen. VI.*, fol. 60). Note, that by a statute (the statute of Lincoln) if certain land is seized in the hand of the king by the escheator by virtue of his office, or by another office, then if another office is found for another, proving the seizure by the king not lawful, and the king makes away to the party, that the king cannot afterwards seize the land by virtue of an office, or without office, without *seire facias* to him to whom he delivered the land, *i. e.*, to enable him to come forward and defend his title if he could (28 *Hen. VI.*, fol. 10). In ancient times (it was said in the last reign) the king could have land which had escheated for felony without an office found, but it was not so now, and so the king could not seize the wardship of his tenant's heir and lands without "office found" (*Keilway*, 17; 12 *Hen. VII.*); so, on the other hand, there would be an inquiry whether and when the heir was of full age, and of what lands he was entitled to "livery." It is to be observed that there was a distinction between inquiries by virtue of an office *mortate officii* and inquiries under writs or commissions. The distinction was drawn in the first year of the reign, probably just before the above-mentioned statute; and it was said that an inquiry might either be good by reason of its being held by virtue of an office (as if escheated), or by virtue of a writ (*Keilway*, 199). And the heir could only use livery of his lands upon an inquisition taken upon a writ proper to the case, the benefit of inquests found by virtue of the office being for the king (*Ibid.*). And inquests taken by virtue of office were returned into the exchequer, those taken for the party into chancery (*Ibid.*, 173).

¹ *Vide ante*.

² Stat. 1 *Hen. VIII.*, c. 8.

were to have a qualification of estate of forty shillings annually. A counterpart of the inquisition, sealed and indented, was to remain with the foreman. The inquisition, when found, must be received by the escheator; the clerk of the petty bag, or officer of the exchequer, if returnable there, was required to receive the return from him; and the clerk of the petty bag was to certify a transcript of all inquisitions into the exchequer. No one was to be escheator for more than a year. All these qualifications were enforced with penalties.

The time of traversing an inquisition, which was confined by a former statute¹ to a month after the return, was enlarged to three months, and all grants made previous to that time were to be void.² By an act of the same session, all inquisitions found in the last reign by procurement of Empson and Dudley, entitling the king to tenures *in capite*, were allowed to be traversed, notwithstanding the parties might have sued livery; and it was declared such livery should not conclude them.³

The law of private rights was affected by several statutes during this reign, many of which were not less important than those we have been relating. The statutes upon this head either regard the properties and incidents of estates, or the modes by which they may be conveyed. Of these the former claim our first attention. We shall begin with some statutes which ever since have had very extensive influence upon leases of lands.

It was in consequence of the new practice of suffering recoveries (a) that it was now thought necessary to enlarge a provision, made in the reign of

Terms for years.

(a) It is difficult to understand what the author intended by this; for if it meant that the use of recoveries was novel, it is inconsistent with the whole tenor of our legal history, and with the statute he mentions in this very sentence, which shows that they had been so used ever since the reign of Edward I.; for in the early part of that reign there was a provision against feigned recoveries by religious houses, and also, as he mentions, a statute to enable termors to falsify recoveries, that is, show them feigned. And the author's observations on the present statute appear to indicate a very erroneous notion of its importance, as though it had effected any great change. The truth is, that up to the present reign leases were rarely made without deed, which was the reason the old statute only referred to such leases. And deeds no doubt still continued to be used to create long terms. But shorter tenancies for years now began to be created by parole; and hence the present

¹ Stat. 8 Hen. VI., c. 10.

³ Stat. 1 Hen. VIII., c. 12.

² Stat. 1 Hen. VIII., c. 10.

Edward I.,¹ to protect termors. As that act speaks of a lessee having action of covenant, it was concluded that no lessees but those by deed could be protected by it. The new statute includes both leases by indenture and those without writing. As a lease for years was an interest issuing out of and dependent on the inheritance and freehold of the lessor, it derived all its strength from the goodness of that title, and by it must stand or fall. Thus a term lay at the mercy of the freeholder, who now had a method by which he could destroy his own estate, namely, by a fictitious recovery, and so destroy the interest of his lessee. This device was often practised to get rid of tenants who had excited envy by the great improvements they had made, or had any way disobliged their landlord. To prevent an injustice of this kind, and at once give stability to these contracts, and insure to the cultivator of the soil the reward of his toil and expense, was an object worthy the attention of parliament. It was accordingly ordained, by stat. 21 Henry VIII., c. 15, that all lessees for years should be enabled to falsify these recoveries, and maintain their leases against the recoverors as against their lessors. It was further provided, that no statute-merchant, statute-staple, nor execution by *elegit*, should be made void by any feigned recovery.

After this (*a*), a term for years became a permanent and certain interest, the value of which might be estimated by the period of time for which it was created, without

statute for their protection from feigned recoveries. As, however, it was only required for the protection of the shorter or less important terms, since all long and important terms continued to be created by, and to this day are so created, and such terms were already provided for and protected, it is obvious that the present act could not have had the important consequences ascribed to it. It appears that it was a moot-point whether or not a tenant for years could not falsify a recovery even at common law. For in the 22 Henry VII. we find it reported that the chief-justice said "that the tenant for term of years could not falsify a recovery, suffered by collusion between the lessor and a stranger, to defraud of his term, if he did not come in pending the recovery, *i. e.*, upon the proclamations which were always made in a real action, to allow of persons interested coming forward" (*Keilway*, 93). This implies that he could come in during the recovery; and the reporter adds, "and other justices agreed," which looks as if they differed. But there was no judgment, and it was a mere *dictum*.

(*a*) This is an error. The statute effected no such important alteration in the nature of terms for years, for it only applied to such as were not created by deed, that is, the shorter and less important terms (*vide ante*).

¹ *Vide* vol. ii.

calculating the contingency of an untimely dissolution, to which it was before subject. Long terms, as they could now be purchased with safety, became more common. They were soon after this converted to the purpose of raising portions for children by mortgage or otherwise in family settlements; and by the aid of the statute of uses, became the object of much of that artificial style of conveyancing which began about this time to gain ground.

When the interest of lessees was protected against the feigned recovery of the freeholder, it was thought equally expedient to give them some security against the issue of a tenant in tail, who, claiming by a title paramount the ancestor, could avoid any leases made by him for longer term than his life. A like inconvenience was felt in other instances of leases made by persons who had only a life estate. To remedy all this, the following provision was made by stat. 32 Henry VIII., c. 28 (a): All leases, says that statute, made by indenture for years or for life, by any person seized in fee or in tail, in his own right, or in the right of his church or wife, or jointly with his wife, shall be good and effectual in law, the same as if the lessor was seized in fee-simple, provided they are made under the following circumstances: if they are not made to any lessee having an old lease (unless the old lease be expired, or surrendered within a year next after the making of the new one), and if they are not made in reversion. It was also required that the land should have been most commonly letten to farm, or occu-

(a) It had been held in the last reign in several cases, and also in the present, that a parson could lease his rectory for term of years by parole, and that the lessee should have the tithes and offerings, for they were incident; and the lease was good, although there was no house, and only the church and cemetery (15 *Hen. VII.*, fol. 8; 16 *Hen. VII.*, fol. 3; 19 *Hen. VIII.*, fol. 12). So an abbot could lease without deed for his own life; and if the lease were beyond his life, and the successor received rent, it was affirmed (21 *Edw. IV.*, fol. 5); and the abbot and convent could lease for term of life by deed (5 *Edw. IV.*, fol. 43). With regard to bishops, it was held that if a bishop leased for term of life, it was not void, but voidable by his successor, and would be affirmed by receipt of rent; and so of lease for years, for the bishop, it was said, had the fee-simple, and so the lease would not be void; but it was otherwise, it was said, of a parson, for he had not the fee-simple, which was in abeyance, and therefore his lease beyond his own life was void (5 *Edw. IV.*, fol. 105); and so, says Burke, it was agreed by all the judges in the 2 Edward VI. (*Bro. Abr., Lease*, fol. 33). It had been held in this reign that tenants for life and the reversioner should join in lease for life (27 *Hen. VIII.*, fol. 13).

pied for the last twenty years; that the lease be not made without impeachment of waste, nor be for above twenty-one years, or three lives; and that there be reserved yearly so much rent as had been most accustomedly paid for the last twenty years. Moreover, where the inheritance belongs to the wife, she must be a party, and the rent reserved to the husband and wife and *her* heirs, according to the estate she has; and the husband is not in any case to alien such rent any longer than during the coverture otherwise than by fine.¹ No act of the husband during the coverture shall cause a discontinuance, or be anywise prejudicial to the wife or her heirs. It was provided² that this act should not be construed as giving a power to any parson or vicar to make leases of his land, tithes, or other profits belonging to his church, otherwise than he could at common law.

This is the substance of what has since been called the *Enabling Statute*, because it empowered certain persons to make such leases as they could not before make; and it is so called in contradistinction to some acts passed in the reign of Queen Elizabeth, which imposed certain restraints on church leases, and are thence called the *Restraining Statutes*.

The interest of lessors and lessees came under the contemplation of the legislature in another point of view. This was occasioned by the dissolution of religious houses (a),

(a) This has already been mentioned in the introductory note as a remarkable instance of the remote and indirect causes which often lead to legislation or alterations in the law. The greater part of the lands held by the religious houses were let on lease; and the statute recites that divers as well temporal as ecclesiastical and religious persons have made leases of manors, lands, farms, etc., containing covenants, conditions, and agreements to be performed on the part of the lessees, as well as on the part of the lessors; and that by the common law no stranger to any covenant or condition could take advantage of it, but only such as be parties or privies thereunto (*i. e.*, privies in blood or in estate), by reason whereof all grantors of reversions, as well as the king's grantors of lands, etc., of late belonging to monasteries and other religious houses, dissolved or suppressed, be excluded to have any action against the lessees which the lessors might have had for breaches of the covenants; and then it enacted as above stated. Under this act it was held in the reign of Elizabeth that covenant lay against the assignee upon a covenant which ran with the land (as to repair the premises); but otherwise if it were a covenant of a different nature, as to erect a new house. It was also held that in such case the assignee was not liable for a breach of covenant which had happened previous to the assignment, *i. e.*, provided it was a covenant which did not "run with the land" (*Hyde v. The*

¹ Sect. 6.

² *Ibid.*, 4.

which gave rise to a provision calculated not only to remove an inconvenience which was particularly felt at that time, but such as would increase daily while a disposition and power to alien land prevailed. Covenants in leases, like other covenants, could only operate between the parties and their privies; that is, those who were heirs or executors to the covenantors or the covenantees; so that grantees of reversions of lands held of religious houses, who were now a very considerable body among the landholders of the kingdom, could not avail themselves of the benefit of covenants in leases granted to their tenants; and tenants, on the other hand, were deprived of advantages stipulated by their former landlords. The first provision on this head was stat. 31 Henry VIII., c. 13, which gave to the king all advantage, whether of covenants, conditions, or the like, as the lessor would have had. By stat. 32 Henry VIII., c. 34, this was extended to the grantees of the king; and further, to make this equitable remedy universal, mutual redress is given in all cases of landlord and tenant, where the former grants his reversion to another.

A defect of the old law respecting executors was supplied in the same sessions by stat. 32 Henry VIII., c. 37. The executors of persons seized of rents could not, any more than their heirs, recover the arrearages which had accrued in the testator's lifetime (*a*). This act provides, that the executors and administrators of any person seized in fee-simple, in tail, or for life, of rents or fee-farms, may have an action of debt, or distrain for all arrears due at the death of his testator, or intestate; as may a hus-

Dean and Chapter of Windsor, 37 Eliz.; *Cro. Eliz.*, 457; *et vide Cro. Eliz.*, 600, 863; *Cro. Jac.*, 305; *Cro. Cor.*, 24, 137; 3 *Coke's Reps.*, 163; 5 *Coke's Reps.*, 116; *Dyer*, fol. 68, 131, 309; *Mon.*, 876; *Golds.*, 175; *Plowd.*, 175).

(*a*) By the common law in case of rent, whether rent-service or rent-charge, while the rent continued of any freehold estate, no action of debt lay for the arrears. But if the particular estate in the rent determined, the executors could have an action of debt for the arrears (*Ognell's Case*, 4 *Coke's Reps.*, 49); that is, when the freehold estate in the rent determined. This statute gives the executors remedy by action or distress for any arrears of the rent accrued at the time of the death of the party entitled. The 8 Anne, c. xiv., reciting that no action of debt lay against tenant for life or lives, for any arrears of rent during the continuance of such estate for life, enacted, that any person having such rent in arrear, on any lease for life, might bring an action of debt for the arrears. But it has been held that this only applied to rent on lease, not rent charged by deed or devise (2 *Williams, Saunders*, 303, 18).

band, seized as aforesaid in right of his wife, after the death of his wife, for the like rents or fee-farms due and unpaid in her life; and a person seized during the life of another, after the death of *cestui que vie*, and so may his executors or administrators.

An alteration made respecting joint-tenancy and tenancy in common seems dictated by the necessities of a commercial people. The idea of property possessed by two or more persons, where each has in him the *entire whole*, and *every parcel* of that whole, as joint-tenants are said to have, is a subtilty in jurisprudence which savors much of the age in which it was conceived (*a*). That every parcel of this undivided whole should survive to the longest liver, was, perhaps, no more than a consequence of the original refinement. But this consequence was found very prejudicial to credit; as property, that should satisfy demands on the estate of the deceased, was absorbed by a stranger, whose only merit was the fortune of having survived his joint-owners. The unity of possession between tenants in common, likewise, though not subject to the doctrine of survivorship, had, however, its inconveniences, to which a clear and several estate was not liable (*b*). These estates, we have seen, were divisible only by the consent of the parties;¹ and it was now thought desirable, that means should be provided for compelling those who might unreasonably withhold their consent. It was accordingly enacted, by stat. 31 Henry VIII., c. 1, that

(*a*) Thus Littleton, s. 322, and Co. Litt., s. 323. "Albeit, one tenant in common takes the whole profits, the other hath no remedy by law against him, for the taking of the whole profits is no ejectment. But if he drive out of the land any of the cattle of the other tenant in common, or do not suffer him to enter or occupy the land, this is an ejectment or expulsion, whereupon he may have an ejectment for the moiety, and recover damages for the entry, but not for the mesne profits; and thus one tenant in common could not have an action of trespass against the other" (*Bro. Abr., Tenants in Common, etc.*, fol. 14, *S. P.*; *Haywood v. Davies, Salk.*, 4). Nor account, even though the other was his bailiff (*Year-Book, 17 Edw. II.*, 552). So a tenant in common could not be a disseisor without an actual ouster of his companion (2 *Ibid.*, 391; *Goodtitle v. Tombs*, 3 *Wilson*, 118).

(*b*) So Litt., s. 313: "If two be possessed of chattels personal in common, and one take the whole to himself, out of the possession of the other, the other has no remedy but to take this from him who hath done the wrong, to occupy in common *when he can see his time*." So Coke's Litt., 200: "If one tenant in common takes all the chattels personal, the other has no remedy by action; *but he may take them again*." So *Brown v. Hodges, Salk.*, 290; *Fox v. Hanbury, Comp.*, 448.

¹ *Vide* vol. iii.

joint-tenants, and tenants in common, of any estate of inheritance, in their own right, or in right of their wives, may be compelled to make partition, by writ *de partitione faciendâ*, to be devised in the chancery, in like manner as coparceners are compellable by the common law. As this act was confined to estates of inheritance, the provision of it is extended, by stat. 32 Henry VIII., c. 32, to tenants for life and years; and also where one person has an estate for life or years jointly, or in common with another who has an estate of inheritance or freehold.

A piece of old law relating to entry on land, and the tolling of entry by a descent,¹ underwent an alteration which has prevented some of the injustice which used to follow from that notion. It was hard that a disseizor, because he died seized, should thereby entirely deprive the injured person from making his entry, and pursuing his legal remedy upon it; but oblige him to resort to a more tedious proceeding. It was therefore enacted, by stat. 32 Henry VIII., c. 33, that the dying seized of such disseizor shall not be deemed a descent in law, so as to toll the entry of the disseizee, or his heirs, unless the disseizor had been in peaceable possession for five years after the disseisin.

Some changes were made in the law of estates by the two following acts. By stat. 31 Henry VIII., c. 3, it was ordained, that certain lands in Kent,² which descended according to the custom of gavelkind, should thenceforward be descendible as common-law estates; the other was, an act which put some further restraints upon gifts to superstitious uses.

There were some gifts of land, which, not being within the statutes of mortmain, had very much increased. It was thought expedient to restrain these alienations, as equally prejudicial to the community with those in mortmain (*a*). This was done by stat. 23 Henry VIII., c. 10, which makes void all dispositions of land to the use of parish churches, chapels, churchwardens, guilds, fraternities, commonalties, companies, or brotherhoods, erected for devotion, or by common assent, without

(*a*) And it was altogether done away with by the Real Property Act, 3 & 4 William, c. xxvii.

¹ *Vide* vol. iii.

² *Ibid*.

incorporation; and also dispositions to the intent to have *obits* perpetual, or service of a priest forever, or for sixty or eighty years. As the age became enlightened, gifts of this kind were viewed with a less favorable eye (a).

(a) The mischief of mortmain, as originally understood, was the diminution of feudal or military services; but as to feudal military service, it was becoming obsolete, having been commuted into money payments; and as to other feudal profits, the legal holders of the lands remained liable to them, whatever the uses to which they held, and which only bound themselves in equity. The truth is, that the original mischief of mortmain, whatever it was, had become itself obsolete, and the real object of this statute was to prepare the way for the confiscation of all the chantry lands, as they were called, the first step towards the suppression of religious houses. This act, it will be observed, was of the 23d year; the lesser houses were suppressed in the 27th year, the others in the 32d, and the chantries in the 37th year. The present act appeared to be directed against future endowments of the nature indicated, but that was only a prelude to the confiscation of the existing endowments. The statute appeared to put the mischief of mortmain upon the perpetuity of the endowments, and which, no doubt, is an objection to those who desire to alienate them. But when it is borne in mind that all the land held by them or any other of the religious establishments were let on leases which, by securing to the tenants permanence of possession, tended to encourage cultivation and promote agriculture, it is difficult to see what in those days could be the mischief from the perpetuity of the endowments. The statute puts the objection to them upon no other grounds. It recited that by reason of conveyances made of trusts of lands to the use of parish churches, chapels, guilds, fraternities, or companies, erected of devotion, or by common assent of the people, without any corporation, and by reason of acts made to these uses, or to the use and intent to have *obits* perpetual or a continual service of a priest forever, there groweth the like losses and prejudice as a case where lands be aliened into mortmain. The perpetuity was secured, it will be seen, by means of trusts and uses, that is, by conveyance of lands to persons in trusts, or for the use of such and such purposes, almost always including prayers for the souls of the donors or *obits*. And many were exclusively called chantries, that is, endowments, not for the support of divine service, but in order to secure the personal benefits of such divine service for the souls of the donors or their relations, according to the doctrine of the Roman Catholic Church as to the power of the priest who offered a mass to effect an appropriation of the benefit of mass, by virtue of his intention, to any particular person. The object of these endowments was to secure the personal benefit of this appropriation for the souls of the donors (or the souls of persons designated by the donors) in perpetuity. Endowments of chantries or masses for the dead are frequently introduced all through the Year-Books. Thus in the reign of Henry IV. there were several cases as to cessavit, or the writ by which the founder or his heirs could recover the land or pasture of the endowment (7 *Hen. IV.*, fol. 20; 12 *Hen. IV.*, fol. 24). In a case relating to some foundation at Gloucester, it was said that in cessavit of masses, where a man could not tender arrears, yet it should be in the discretion of the court to fix some sum certain to be paid to the plaintiff in satisfaction of the masses (14 *Hen. IV.*, fol. 3, 4). It is to be observed that the essence of these endowments lay in their *perpetuity*, in order to secure the perpetual benefit of the masses for the souls of the donors or founders. And this required the aid of legal sanction and incorporation. The king alone could grant a license to found a chapel or a

These sentiments concurring with the designs of the enterprising prince upon the throne, contributed towards

chantry (*Year-Book*, 21 *Edw. IV.*, fol. 46). The license of the pope was not sufficient. The king alone could grant license to alienate lands in mortmain, that is to say, to any spiritual persons or ecclesiastical corporations. The king's courts alone could determine on the right of presentation to benefices, and the *Year-Books* were full of cases of *quare impedit*, to try the right of presentation. The writ of *quare impedit* was the proper remedy, even for a church newly founded, without presentment (*Year-Book*, 21 *Edw. IV.*, fol. 3). And so as to the right of presentation to all ecclesiastical offices, masterships of colleges or hospitals, etc. (11 *Edw. IV.*, fol. 4), chaplaincies to chantries (13 *Edw. IV.*, fol. 3). Thus the endowments of these chantries were recognized by law as corporations, with that capacity of perpetual succession which was essential to the fulfilment of their objects. Guilds and fraternities required a special incorporation to allow of this; but in the case of a chantry, the foundation would be by endowment of the priest and his successors, and that would be good tenure to his successors, and not to his heirs (*Year-Book*, 20 *Edw. IV.*, fol. 21). These chantries, therefore, were corporations, whether in the case of a single priest thus endowed, or in a case where there were several so endowed by the name of the master and chaplains of a chapel or chantry (21 *Edw. IV.*, fol. 19; 21 *Edw. IV.*, fol. 75, 76). The patronage or appointment of these chantry priests was recognized and protected by law, and *quare impedit* could be maintained for a chantry (*Paston, J.*, 9 *Hen. VI.*, fol. 17; *Redwick's Case*, 1 *Hen. VII.*, fol. 19). In the reign of Edward IV., a case had occurred in which the subject was elaborately argued; and it was held that the essence of such endowments was perpetuity. It was a case in which land was held in pure and perpetual alms (*en pure et perpetual almoigne*); and it was argued that it was held of the donor and his heirs, for that they alone were entitled to the benefit of the services; and although they had no temporal services, yet they had other services, which counteracted such service, and were of great value, viz., prayers. It was said, however, that if the services were not performed they had no remedy; for if the convent did not pray for the donor and his heirs, they could not distrain the abbey, nor have writ of cessavit. And it was also said, that if all the monks were to die, the donor or his heir could not recover the land; for the gift was perpetual, and with the intent that it should not fail. When the succession failed, it was said, the gift determined; but the chief-justice said it did not fail merely because the monks died, or left the house, for others could be found. So that the house and its divine services could be well kept up; so that the land could no more be recovered because the monks died, than the land of a parsonage could because the parson died. And though all the monks should be dead, yet the service was only in suspense, until other monks should be found. And it was also said that if lands should be given in *puram et perpetuam elemosynam*; that if the convent would not pray for the donor, he could not have writ of cessavit, unless the land should be given for special services, as to chant certain masses, or to hold anniversaries or obsequies, but not if given generally (*Year-Book*, 7 *Edw. IV.*, fol. 12). In the reign of Henry VII., a case arose in which the king, by his letters-patent, had granted to a man that he might give twenty marks of annual rent to a certain chaplain, to celebrate the divine mysteries in such a place, for the good estate of it, and for the souls of certain persons, as it might ordain, "*juxta ordinationem ipsius A.*" It was objected that it appeared to imply an incorporation, and also a license to take land in mortmain, and that it could not be both, and that there was no corporation in existence; and further, that the king

the general attack which was soon after made on one branch of such institutions, the religious houses. These

purported to convey his power of incorporation to a subject, etc. But it was held that the license and the incorporation might be at the same time, and in the same grant; and that the words "*juxta ordinationem*," etc., should take effect, not as an incorporation, but to regulate the masses, and how he would have his *obits* by succession, etc. (*Year-Book*, 2 *Hen. VII.*, fol. 14). It will be observed that succession, and therefore incorporation, were necessary to carry out the objects of those endowments, and that it could only be by royal grant. That the perpetuity of these endowments had been obtained was abundantly established by numerous cases in the books. Thus, in the late reign, there was a case in which, as long ago as the reign of Henry III., a fine had been levied to secure the offering of masses, which, it appeared, had been kept up ever since (16 *Hen. VII.*, fol. 9). There were also similar laws in the last reign (10 *Hen. VII.*, fol. 14). These, however, were the chantries; that is, endowments entirely for masses for the donors or others to be benefited. There were a vast number of other endowments of a mixed nature; that is, for the use of a church or chapel or hospital, or some other religious or charitable object, with the obligation superadded of *obits* or prayers for the souls of the donors or others. The statute applied to all such endowments in perpetuity, whether chantries or charities, and restrained others for the future. They were speedily suppressed by all sorts of ways, and the 37 Henry VIII. declared the crown to be in possession. It is to be observed that this act only applied to future endowments; that is, such as might be created after the passing of the act. But, as it became obvious from the present act, and from the acts of the 27th year suppressing the religious houses, that it was intended to suppress all these endowments, it appears that the founders and donors, or their heirs, had begun to resume possession of the lands in order to prevent their confiscation. In consequence of this, the 37 Henry VIII., c. iv., a bill for colleges and chantries, reciting this, proceeded to give them all to the king. The 1 Edward VI., c. xiv., made further provision with the same object, and commissions might be issued by the crown to ascertain what were chantry lands within the scope of the act; that is, lands given for the perpetual maintenance of priests to offer prayers for the souls of the donors. This was entirely different from endowments for the support of divine service or other religious or charitable uses; and hence it was held, in a case where lands were given to certain persons and their heirs upon trust to erect a free school and maintain so many poor men, that this was not within the statute 23 Henry VIII., which only restrained "superstitious uses" (*Cro. Eliz.*, 288). It was afterwards held that it was not the intention of the act to extend to good and charitable uses; that is, for the support of schools, or hospitals, or colleges, or almshouses; but only to take away such superstitious uses as to pray for souls supposed to be in purgatory, and the like; and not to prohibit the erecting of grammar-schools and relief for poor men; for no time was so barbarous as to abolish learning and knowledge, nor so uncharitable as to prohibit relieving the poor; for almost all the lands belonging to towns or boroughs, not incorporate, were conveyed to several inhabitants of the parish and their heirs upon trust and confidence to employ the profits to such good uses as defraying the taxes of the town, repairing the church, maintaining the poor of the parish, or supporting other charges of the parish; and it would be dishonorable to the law to make such uses void (*Porter's Case*, 1 *Coke's Reps.* 24; *Magdalene College Case*, 11 *Coke*). But this was held long afterwards, and was little regarded in the present reign.

repositories, where so much wealth had been accumulating for ages, were broken open, in pursuance of stat. 27 Henry VIII., c. 28, and stat. 32 Henry VIII., c. 34, and, happily, their contents were once more permitted to mix in the national circulation.

Next to the laws respecting the nature and properties of estates, we proceed to those which related to the conveyance of them. Several regulations were made for the confirmation of fines and recoveries, as assurances of land; and some of a very particular kind, were made for the better ordering of uses and wills.

The application which had lately been made of common recoveries, rendered them a very interesting object of parliamentary notice. As they were become a common assurance of estates, they began to deserve every support which could be given them. It was common to suffer recoveries of land for the performance of wills, for surety of jointures, and other estates; and as such recoveries were had by mere consent and agreement, as a conveyance of the title, it was held, that as the recoverors came in merely under the estate of the recoverees, they had no power by law to compel the attornment of the tenants, nor could they obtain their rents and services by distress or action; and where an advowson was appendant, and an avoidance fell, they had no remedy for a disturbance. They are therefore enabled by stat. 7 Henry VIII., c. 4, to distrain, and make avowries for rents, services, and customs, and bring à *quare impedit*, as those persons against whom the recovery was had might have done. This act was confined to distresses and avowries for rents, services, and customs. As a recoveror could not, upon this statute, have an action of debt against a lessee for years, nor *waste* against a tenant for life, or years, these defects are cured by stat. 21 Henry VIII., c. 15, and such actions are given in the same manner to the recoveror as the lessor might have had them.

This provision as to avowries was of use where the tenant was known; but it often happened that, by secret conveyances to uses, lords were at a loss on whom to make their avowries; the ownership of the land often passing without any notice, or sign of alienation. It was for this reason enacted, by stat. 21 Henry VIII., c. 19, that lords distraining *may* avow on the land, as in land within their

fee, or seignior, without naming or making avowry on any person in certain. As the statute uses the word *may*, lords have their election to avow according to the statute, or as they before did at common law.¹

To return to the provisions made respecting common recoveries (*a*). It was declared by stat. 32 Henry VIII., c. 31, that a recovery of land had by assent of parties against a tenant by courtesy, tenant in tail after possibility of issue extinct, or tenant for life, should be void, with regard to those in reversion or remainder, unless it was by good title (*b*), or assent to those in reversion or re-

(*a*) The 21 Henry VIII., c. xix., gave the landlord a power to plead generally in avowing for a distress upon his actual tenant, upon the principle that it is not for a tenant to require his landlord to disclose his title—a principle carried out by a more modern statute (11 Geo. II., c. xix.). And these statutes have been applied by the courts to the case of executors distraining under 32 Henry VIII., c. xxxvii., for rent due to their testators in their lifetime. In such cases it has been held that the avowee need not show the title of the testator nor how the plaintiff became entitled (*Merton v. Gillee*, 8 Taunt., 158; *Marton v. Boston*, 1 B. & B., 279). It is enough to show that the plaintiff was tenant to the testator, and that rent accrued due (*Stanforth v. Sinclair*, 2 B., 193).

(*b*) Not long before the statute it had been held that where there was tenant for life, with remainder over, in a suit against the person in remainder, there might be a recovery against the tenant, which would bind the person in remainder (*Bro. Abr., Recovery*, fol. 28; 27 Hen. VIII.). So it had been held, that a recovery against tenant in tail should bind the issue in tail (*Ibid.*, fol. 27; 23 Hen. VIII.); and that if feoffees to the uses of an estate-tail, or otherwise, suffered the common recovery, it should bind the feoffees and their heirs (*Ibid.*, fol. 29; 28 Hen. VIII.). So it was held that where there was tenant for life, with remainder over in tail, and the tenant for life being sued, vouched the person in remainder, and so the recovery passed, then the issue could recover against the tenant for life; for the ancestor only guaranteed the party a remainder, and not the estate for term of life, and therefore the tenant for life could not bind himself by the recovery; and so the proper way was to make the tenant for life pray aid of him in remainder, and to join them, and so offer the recovery (*Ibid.*, fol. 30; 30 Hen. VIII.). It is to be observed, this statute only applied to those in reversion or remainder. The law was thus laid down after the statute, that a stranger to a fine or recovery should not plead it for an estoppel; *contra*, if he claim the same land under the fine or recovery by those who were parties, or if he claim the same estate, and that estate continues, for then he is privy (36 Hen. VIII., *Bro. Abr., Estoppel*, fol. 216). Privies in blood, as the heir, and privies in estate, as the feoffee, lessee, etc., or privies in law, as tenant in dower, or those who came in by act of law, shall be bound by estoppel; and so a stranger to a fine might say that the party who levied it had nothing in the land (*Co. Litt.*, 352). A fine barred by estoppel parties and privies, but not the heir-at-law, if a stranger to it. The scope and interest of this statute (which was after the statutes of wills and uses) may be best illustrated by the cases in the courts on the subject just before it passed. All the judges were assembled in the 19th year of the king (thirteen years before the act) to consider this question, whether if

¹ 1 Inst., 268 b.

mainder. In this manner, by obviating the abuse of it, the parliament tacitly acknowledge and ratify the application of a recovery as an assurance of land. So entirely were recoveries considered as a common assurance and conveyance, that where they were suffered of lands held of the king, a fine was required by a clause in the statute of wills, stat. 32 Henry VIII., c. 1, to be paid for the writ of entry in the chancery, the same as for alienation by fine or feoffment.

Some doubts had arisen whether the indirect and general wording of the statute of fines passed in the last reign might not bear a construction which would make a fine to be taken as a bar to an estate-tail. In the 19th year of the king, this question was solemnly argued at Serjeant's Inn, when it was held by three justices that the issue were not barred, and by five, that they were.¹ The former insisted that the issue were aided by the second saving clause, the issue being neither party nor privy, but as strangers claiming by the donor. The latter denied this, holding the issue clearly to be privy to the fine levied by their ancestor. However, if any doubt remained, an act was now made to remove it (*a*); and it was declared by

the tenant in tail in use made feoffment or suffered a recovery, it should bind his issue and the feoffees after his death or not? And the greater part of them agreed that it should not; and the same law was held of a recovery (19 *Hen. VIII.*, fol. 24). *By the statute 1 Richard III., c. i., it was said that any estate or grant of the land should be good against the feoffees, donors, or grantors, and their heirs, *i. e.*, claiming as heirs of the parties; but here, it was said, the claim was to the use of the heirs of the body, which was different. It was urged strongly, that this now made the statute of no effect, and that the greater part of the land in the realm was in the hands of feoffees or recoverees to uses in tail, and that feoffments, or leases, or jointures, made by them, could be defeated after their death. Nevertheless it was held, and hence the necessity for the above statute.

(*a*) In the 19th of the reign, some years before this statute, before all the judges of England, a great question was raised among them, which was this: Tenant in tail levied a fine of his land, with proclamations, and the five years passed in his life, and afterwards he died; and the question was, whether his issue should be barred or not? (19 *Hen. VIII.*, fol. 7). It was argued by some of the judges that the issue were not bound, for the statute 4 Henry VII., c. xxiv., was that such fine shall be a final end and conclusion, and conclude privies as well as strangers, saving to all persons and their heirs, other than they who were parties to the fine, their right and interest which they had at the time of the levying of the fine, provided they pursued it within the five years. Saving also to all other persons such right, title, and interest as should first grow, remain, descend, or come to them *after* the fine or proclamation, by force of any title or matter *before* the fine levied. And upon this

¹ 19 *Hen. VIII.*, 6; and also Dyer, 2, 1.

stat. 32 Henry VIII., c. 36, that a fine levied by a tenant in tail of full age, according to stat. 4 Henry VII., should be a sufficient bar to himself and his heirs claiming by force of such entail. There was in this act an exception in favor of the inheritance of a husband, protected by stat. 11 Henry VII., c. 20,¹ and of lands where the reversion was in the king; so that a fine of such land, levied by tenant in tail, remains entirely on the construction of stat. 4 Henry VII. The parliament took the same care of the king's interest in the case of recoveries as in the case of fines; for it was declared by stat. 34 and 35 Henry VIII., c. 20, that no reversion in the king should be barred by a recovery (a). This was not before the point had been agitated in court. In the 29th of the king, it had been held by the judges, that a recovery suffered by tenant in tail, though a bar to the issue, should be no discontinuance of the tail, and so no bar of the king's reversion; but Shelley doubted.² Among the provisions for giving stability to these securities, we may reckon stat. 37 Henry VIII., c. 19. As none of the statutes of fines extended to the county palatine of Lancaster, it was thereby ordained, that fines levied before the justices of assize there, proclaimed three several days the sessions they were engrossed, and three several days the two next sessions, should have

latter saving clause it was said the issue in tail could recover, for his right and interest first came to him after the fine, and yet it arose before the fine on the gift in tail; and he was not party or privy to the fine, for he claimed through the donor; a mode of reasoning not quite consistent and somewhat narrow, and which had virtually been discarded long before. The majority of the judges held otherwise,—that the fine was a bar. For they considered that the saving clause relied upon only applied to strangers to the fine, not privies. The intent of the statute, they thought, was, that they who claimed through the same tenant in tail who levied the fine should be deemed privy to the fine levied by the ancestor from whom he deduced descent; and if he were privy to the fine, he was concluded. It seems strange that such a question should be raised after the numerous statutes and decisions which had established the authority of fines; but, as it had been raised, it probably led to the passing of the above statute.

(a) What was held there was, that recovery had against tenant in tail, with remainder or reversion in the king, would bind the issue in tail, but not the king, by the common law; but that, by the statute 34 and 35 Henry VIII., c. xx., such recovery would not bind the issue in tail (*Bro. Abr., Recovery*, fol. 31). The statute provided that feigned recoveries, by assent of parties, of lands the reversion of which was in the king, should not bind the heir in tail, but after the death of tenant in tail, he might enter. Thus the author had failed to perceive the effect of the statute, which was to preserve the right to the issue in tail.

¹ *Vide ante*.

² 28 and 29 Hen. VIII.; Dyer, 32, 1.

the same force as fines levied in the court of common pleas.

The principal provisions upon the nature of conveyances were such as concerned uses and wills, two subjects which were very intimately connected in their circumstances (a), and now went hand in hand in the regulations the parliament thought proper to devise respecting them. We shall therefore, conformably with the idea that prevailed at the time, take a view of these statutes together, whether they relate to uses or wills, in the order in which they were made, as the most natural one for illustrating this important branch of our law of real property.

In the last reign some relaxation had been given to the

Devise of land. ^{general law which restrained a devise of lands}
(b). We have seen what indulgence had been

(a) This has been already amply shown in the notes on the subject in the reign of Henry VIII. It has been seen that men, by means of conveyances to uses, and declarations of last will, in reality effected the disposition and devise of land by last will.

(b) It is to be observed that the feudal system, with its obnoxious incidents of wardships and marriages, only applied to the heirs of lands held in chivalry, or by knight-service (*Bro. Abr., Garde*, fol. 92, 97, 120). The guardianship or wardship could be granted by deed to another (5 *Hen. VII.*, fol. 36), just as a villein might be (*Ibid.*); and this was the worst feature of the system, for the guardianships were constantly sold, often, no doubt, to most unscrupulous persons, being a source of profit, so that it was a constant subject of litigation (2 *Hen. VII.*, fol. 2; 12 *Hen. VII.*, fol. 19). The worst incident of the system was that of marriage, that is, the right of the lord to tender to the heir or heiress a marriage, and, on refusal, to recover a considerable sum, as the "value" of the marriage, that is, the sum he could have made of it by selling it (2 *Hen. VII.*, fol. 9), a most disgusting species of traffic for "the age of chivalry." The marriage of the ward, no doubt, was an emancipation, even though it took place under age, the age of marriage for a girl being fourteen; and sometimes, in the eagerness of the lord to reap the fruits of the bargain by which he sold his ward, a girl was married at the early age of fourteen (*Bro. Abr., Garde*, 86; 28 *Hen. VIII.*). As to which, however, it is consolatory to find, that the young heiress, on attaining her majority, if she married *infra annos nobiles*, could dissent, and thus disannul the marriage (*Ibid.*, 124; 15 *Mary*, fol. 1); and the doctors of the civil law declared that in such case the marriage was so thoroughly dissolved, that the parties could marry again without a sentence of divorce by the ordinary, and that second espousals would be lawful by the law of the land not less than by the law of the church (*Ibid.*). So, as to the feudal system, and all its oppressive incidents, especially of wardships and marriages, although it still existed, it was evidently dying out by degrees, and becoming obsolete. In the long reign of Henry VIII. there were cases of the exercise of these obnoxious powers, but in the longer reign of Elizabeth there appear to have been much fewer, and, at all events, they are not frequent, and few are to be met with in the books. It appears that the objectionable practice of granting out wardships and marriages was growing into disuse, and was discouraged (*Dyer's Reps.*, 44, 45). There was a case in which the queen granted

given to persons in the king's wars to make feoffments to the use of their wills without license. Again, in this reign, by stat. 3 Henry VIII., c. 4, a permission was given to tenants *in capite* to alien without license, and if they left a son within age, their executors, feoffees, or assigns were to have the ward and marriage towards the performance of the will. By stat. 14 and 15 Henry VIII., c. 14, those in the king's service, in the wars, might alien their lands for the performance of their wills, without a fine for alienation, with the same indulgence as to ward and marriage. These were partial regulations, calculated for the benefit of persons under very particular circumstances.

A disposition to favor devises of land discovered itself afterwards in a more general way, in stat. 21 Henry VIII., c. 4. Land devisable by custom was very often left for executors to sell; and in such case, if one of them refuse to join in the sale, the sale could not be legally perfected by the others.¹ It was enacted by this act, that in such circumstances, where any of the executors refused to take upon them the burden of the administration, a sale by those who did act, should be good and valid. Though the letter of this act extends only to executors who have a *power to sell*, yet, being a beneficial law, it has received a liberal construction, and has been considered as taking in cases where land is *devised* to executors to sell; that is, where they have not barely a power, but a power coupled with an interest.

Hitherto we see the power of devising land received some favor from the parliament; but this matter was taken up again in a very different way: the power of devising the use of lands, carried the general power of transferring property by will much further than was consistent with the nature of tenures. It tended to deprive lords of their wards, marriages, and reliefs, and the king of his *primer seisin*s and livery, with other casualties, which constituted a great part of the old revenue of the crown (*a*).

a ward and marriage, but saving the land; and when the grantor tendered a marriage, which was refused, he could not retain the land (*Ibid.*, 66).

(a) Many cases in this reign, before the statutes of uses or of wills, showed the close connection between uses and wills, and that uses had long been made use of as a means of making wills of land. Thus in a case where a man had enfeoffed another to the use of his last will (*ad usum ultimæ voluntatis*), it was laid down by the court that this would be good unless altered;

¹ *Vide ante*, vol. iii.

We have seen, in the former reign, that the statutes which were made to protect the lord's claims upon a descent on

and that it might be altered by the feoffor at any time, that is, that other uses might be declared, whether by way of last will or *inter vivos*. And it plainly appears from the way in which the judges speak, that the practice of will feoffments to the uses of a last will had become quite settled and established (19 *Hen. VIII.*, fol. 12). This was in the 19th of the king, and the statute of uses was not until the 27th, and the statute of wills was still later. So in another case of the same reign, before all the judges in the exchequer chamber, the case was this : that one who had feoffed to his use, made his will, and made executors, and declared by his will that they should have his land in tail, and if he died without heir of his body, then that the land should be sold ; and he died without heir of his body, and the executor of his executor sold the land, and the precise question was whether he had power to sell under the will ? and it was held that he had not (19 *Hen. VIII.*, fol. 9). But it was implied and affirmed all through that the use was valid, and might have been executed by the executor, although it was really and virtually a disposition of land by his will. And it was said that before the 1 Richard III. a will of land made by him who had the use was not good ; which was agreed to by the whole court, and implied that since that statute it was good ; and it was added, that now since that statute he who had land devised to him could enter and make feoffment, for the statute said that feoffment, if *cestui que use*, should be valid, which implied that a devise of land carried the use. In another case it was urged that the object and effect had been to defraud the king of his wardship (as the donor held in chivalry, of which wardship and marriage were incidents), and therefore it was allowed. It was argued on the other hand, that uses were at common law, for that a use was nothing but a trust, and that trust and confidence were very necessary between man and man ; and a series of statutes on the subject, recognizing uses, were cited (as those of Richard II. and Henry IV. as to pernors of profits, and that of 1 Richard III. as to feoffments to uses, and the act of the last reign, 6 Henry VII., to the like effect). And as a use could pass by parole, by the same reason it could pass by disuse. And so it was said it had been lately held (in the 20th of the reign), by all the judges of England, which clearly showed, it was said, "that a man might make his testament of a use," *i. e.*, by means of a use. Thus it was distinctly declared that some years before the statute of uses, and ten years before the statute of wills, it had been held that wills could be made by means of uses. Montague, chief-justice, put this clearly when he said it was reasonable to uphold a testament as the last act and will of a man, in so far as it went to provide for the doing of that which he could not do himself, and for which cause he necessarily placed confidence in others. Uses, he said, were at common law, for the common law was nothing but reason ; and reason dictated that a man should put trust in another, and a use was but a trust ; which was common reason, and common reason was common law. And so the law had long been held to be, and supported by various statutes, and this continuance made it to be law if it was not contrary to reason ; for in the civil law it was said, *communis error facit jus* ; and it would be of great mischief to change the law now, for many inheritances of the realm depended at this day on uses, so that it would be great confusion if they were disturbed (27 *Hen. VIII.*, fol. 10). This being the opinion of the common lawyers, there is no reason to doubt that the chancellor held the same view ; and at all events, it will be seen that the views here declared were afterwards affirmed in the statutes of uses and of wills. In another case in the same year, *cestui que use* of himself and his

the death of *cestui que use*, contained an exception of cases where a will was declared.¹ This excited a great jealousy, both in the king and other great landholders. The king, in the 22d year of his reign, caused a bill to be drawn, which was to moderate the consequences of this innovation. It was intended by this bill, that every one should have free liberty to dispose of half of his lands, in the way of devise; and he told the parliament, if they would not take a reasonable thing, when offered, he would seek out the extremity of the law, and would not offer so much again. This act passed the lords, but it was rejected by the commons. The king, disappointed by this failure, consulted the judges and eminent lawyers, and the question was solemnly argued in chancery, where, we are told, it was decided that a man could not bequeath any part of his land in prejudice of his heir;² a proposition, of which

wife and the heirs of his body, bargained the land for money, and afterwards he and his wife levied a fine of the land to a stranger, and the question was, whether the fine was void or not? and it was agreed that it was, for that the parties to the fine had nothing in use or in possession; for by the bargain the use was in the bargainer, and not in the prior *cestui que use*, nor the stranger; and at first Montague seems to have taken that view, but in the end he held the fine good. For otherwise it would be a great inconvenience. As if *cestui que use* sell to me his land, and then suffer a recovery, if this recovery should be void—for that by the bargain the use was not of the vendor—it would be a great mischief, and many recoveries would be by this way void. The other judges appear to have agreed, and one of them said, “It is a common case, and it is great folly in purchasers not to make *cestui que use* make feoffments to them before the fine is levied, and then it would be good.” His opinion was, that a fine levied by *cestui que use* in tail was good always, but that this was a good case, *i. e.*, a good and important decision (27 *Hen. VIII.*, fol. 21). There can be no doubt it led to the statutes as to uses, fines, and wills. The close connection between the subject of uses and of wills, and the doctrine of the law, both as to the common law and the statutes as to uses, were well illustrated in a remarkable case which came into the court of chancery before the chancellor and all the judges in the 27th year of the reign, just before the statute of uses (which probably may have been suggested by it), and some years before the statute of wills. The case was, that it had been found by an issue before the escheator of Kent, that certain persons were seized to the use of Lord Dacres and his heirs, and that they being so seized, Lord Dacres, by covin and collusion with them, and with intent to defraud the king of the wardship and marriage of his (Lord Dacre’s) son, declared his will to be that the feoffees should pay the sum required for a marriage, and should hold the lands during the minority of his son, applying the profits to his debts, etc., with a remainder in tail and remainder in fee, the son being then under age. The feoffees had been ousted under this issue, and they came into chancery for relief, and it should seem that they had it (27 *Hen. VIII.*, fol. 8), although it is not distinctly stated what the decree was.

¹ *Vide ante.*

² Burn, *Ref.*, vol. i., 112.

there could be little doubt, if it is to be understood of the devise of *land*, and which, notwithstanding, left the question as to declarations of uses where it was (a). The only remedy was to destroy uses entirely; and it was with that view that the statute of uses was procured some few years after.

The mischiefs arising from uses were not confined to the single object of feudal claims on land, but infected almost every transaction concerning landed property. These mischiefs were not subdued by the remedies the legislature had already at different times applied. Indeed, one of these remedies, the statute of Richard III., had somewhat increased the perplexity before complained of, that of divers claims to the same land. That statute had enabled the *cestui que use* to make feoffments and other assurances of his land, while the feoffees still continued their common-law right over it (b). The

(a) This, which is borrowed from Burnet, and followed by Hume, has been already commented upon in the introductory note to this chapter. It is surprising that our author should have relied on so loose an authority in a matter of law, and it has egregiously misled him. He himself seems to have perceived, indeed, that any such decision, had it been given, would have been nugatory, for no one could have supposed that it was allowable in any direct way to devise land; and on the other hand, it was notorious that it was done indirectly by means of uses. The decision of the courts of law was, it has been shown, just the reverse of what Burnet had supposed, viz. that it was possible practically to effect a devise of land by means of uses, so as to defraud the lord of his feudal services; and this had been actually recognized by the statute 4 Henry VII., which enacted, that where no will was declared, the lord should have his wardship, and even this, it had been distinctly held, did not give the lord "primer seisin," or "livery," *i. e.*, the fine due on admission of the heir, either when he was within age, or of full age, at his father's death (26 *Hen. VIII.*, fol. 2). The law, therefore, was exactly the reverse of what our author supposed; and the king, seeing that the law indirectly allowed of wills, tried to limit the power.

(b) The statute of Richard III. only enacted that feoffments or conveyances by the *cestui que use* should be good as against him and his heirs, and it was repeatedly said it was for the benefit of the grantors, not of the *cestui que use*, so that if he entered, and made a feoffment, the feoffee should have assize (5 *Hen. VII.*, fol. 5; 7 *Hen. VII.*, fol. 6). The statute of 4 Henry VII., however, had provided that if the tenant *in capite* made conveyance to uses, and died without declaring a will, leaving his heir under age, the king should have the land in wardship, and if he was of full age, should have a relief as if the father had died seized, and it had been held just before the statute of uses, that the act of Henry VII. only gave wardship or relief, and not livery or premier seisin (26 *Hen. VIII.*, fol. 2). There can be little doubt that this case and that statute suggested the present statute, which proceeded upon the same principle, viz., of regarding the use as if it vested the legal estate, *i. e.*, not by destroying the use, as our author supposed, but by vesting it, and thus giving full effect to the transfer or dis-

consequence of this was, that the *cestui que use* might limit an estate for life, or in tail, or make a lease of the land; and the feoffee, perhaps, might do the same, having each an equal right.

Thus, purchasers were never safe while two persons had the disposal of the same land. But the numerous other inconveniences attending uses, as recited in the statute, made it necessary to apply some fundamental remedy to these disorders. This was meant to be effected by the famous statute of uses, 27 Henry VIII., c. 10. What the opinion of that age was upon this subject, and what was the design and plan of that statute, cannot be better collected than from the title and preamble of it. It is entitled, "An Act concerning Uses and Wills." And the preamble states, that "Whereas by the common laws of this realm, lands, tenements, and hereditaments be not devisable by testament, nor ought to be transferred from one to another but by solemn livery and seisin, matter of record, writing sufficient made *bonâ fide* without covin or fraud; yet, nevertheless, divers and sundry imaginations, subtle inventions and practices, have been used, whereby the hereditaments of this realm have been conveyed from one to another by fraudulent feoffments, fines, recoveries, and other assurances craftily made to secret uses, intents, and trusts; and also by wills and testaments, sometime made by *nude parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited

position; so that this act did not, any more than the previous statute of Henry VIII. in the least interfere with the disposition of land by last will through the means of uses. If a man, before the statute of uses, conveyed to his use for life, the remainder over in tail, the remainder to his heirs, and died, and thus the tenant in tail died without issue, the heir of the feoffor should sue livery of his land, for the fee-simple was not of him, and therefore descended to his heir. And so, after the statute, if a man gave land in tail remainder to his right heirs. But otherwise, where a man made feoffment in fee in possession, and retook for term of life remainder in tail, and the remainder to his right heirs, and died, and then the tenant in tail died without issue, there the right heir would be purchaser; and if the king seized the land, he should have a writ of *amoveas manus*, and need not sue out livery of his land (*Bro. Abr., Liveries*, fol. 64; 32 *Hen. VIII.*). It may here be stated, that livery of the land, *i. e.*, delivery of the heir's land, involved the right to demand payment of the full value of the land for half a year (*Ibid.*, *et vide* fol. 58). The writ of *amoveas manus* ousted the king without any profit (*Ibid.*). It is to be observed that it was only tenants *in capite* who had to sue livery of their land or premier seisin (*Ibid.*, fol. 606).

by sickness, in their extreme agonies and pain, or at such time as they have scantly had any good memory or remembrance; at which times, they, being provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetly, and unadvisedly, their lands and inheritances; by reason whereof, and by occasion of which fraudulent feoffments, fines, recoveries, and other like assurances to uses, confidences, and trusts, divers and many heirs have been unjustly, at sundry times, disherited, the lords have lost their wards, marriages, reliefs, heriots, escheats, aids *pur faire fils chevalier et pur file marier* (a), and scantly any persons can be certainly assured of any lands by them purchased, nor know surely against whom they shall use their actions or executions for their rights, titles, and duties; also men married have lost their tenancies by the courtesy, women their dower; manifest perjuries by trial of such secret wills and uses have been committed; the king's highness hath lost the profits and advantages of lands of persons attainted, and of the lands craftily put in feoffments to the uses of aliens born, and also the profits of waste for a

(a) At common law, *cestui que use* did not forfeit the benefit of the use for treason or felony, for it was only a trust, but did not deprive the lord of feudal incidents, except through the medium of wills. The statute of Henry VIII. only protected the lords as to wardship, when the *cestui que use* declared no will to appoint the use, and his heir died under age. The king, by the common law, suffered no loss in such a case; for if the heir of the feoffee to the use was within age (whether *cestui que use* was alive or dead, and his heir of full age), the king should have the wardship of the heirs of the feoffee and of the land; and under the statute of Henry VII., he had the wardship of the heir of *cestui que use* if no will was declared (*Jenkins' Centuries*, 190). The statute only applied where the land was held *in capite*, and did not aid, except as to wardship and relief, not for livery; a relief being the feudal incident if the heir was within age, livery when he was of full age (20 *Hen. VIII.*, fol. 3; 26 *Hen. VIII.*, fol. 27). Even if the heir within age was married, though the person should not be in wardship, the land would be so, and the king would have a relief (*Ibid.*). After office found for the subject in due manner, as the law required, and proof of the full age of the heir, a general livery was due to the subject of right, and could not be denied to him or delayed, although a special livery might be denied, for it contained a pardon for intrusion, and such livery served, notwithstanding the not finding of an office for the heir, or though the proof of full age is not sufficient, for the special livery was *de gratiâ regis*, and was commonly used (*Jenkins' Centuries*, 197; *Keilway*, 176; *Dyer*, 170). The Duke of Buckingham, on coming of age, had to pay £3000 for a special livery, and the year before his trial and execution strove to get it back as excessive and bad, *ex gratiâ*, or restitution of £1000, which, with his claim to the office of high constable, probably sowed the seeds of that ill-will between him and the king which led to his unhappy fate.

year and a day of lands of felons attainted; and the lords their escheats thereof; and many other inconveniences have happened, and daily do increase among the king's subjects, to their great trouble and inquietness, and to the utter subversion of the ancient common laws of this realm: for the extirpating and extinguishment of all such subtle practised feoffments, fines, recoveries, abuses and errors," this act was made. Such is the preamble of the act usually called *the statute of uses*, and in all pleadings and deeds, the statute for *transferring uses into possession*, or the statute for *conveying the possession to the use*.

If one statute of Richard III. had added to the former mischiefs of uses, another furnished a hint for the entire destruction of them. That monarch, while Duke of Gloucester, had been enfeoffed to uses, either jointly with others or by himself. To obviate the notion of law, that the king cannot be seized to a use, and the manifest injustice of his holding such lands discharged of the use, it was provided by that act, that where he was joint feoffee, the other feoffees should stand seized to the uses without him; and where he was sole seized, the land should be vested in the *cestui que use*, in the same manner as he had the use (*a*). In a similar way, the statute of uses enacts, that, when any person shall be seized of lands, or other hereditaments, to the use, confidence, or trust of any other person or body-politic, the person or corporation entitled to the use in fee-simple, fee-tail, for life or years, or otherwise, shall from thenceforth stand and be seized, or possessed of the land, of and in the like estate as they have in the use, trust, or confidence; and that the estate of the person so seized to the use shall be deemed

(a) The author had forgotten the still nearer analogy afforded by the stat. 4 Henry VII., which enacted that if the tenant *in capite* conveyed to uses and died, without declaring last will, leaving an heir under age, the king should have the wardship of the land (or relief, if the heir was of age) just as if the tenant had died seized; this, be it observed, not only did not interfere with the power of disposition of land by means of uses, but expressly recognized it. Nor was there, it will be seen, anything in the present statute to interfere with that power, or to affect the power of transfer of land by means of uses. The scope of the statute, as that of the former statute, was recognizing the uses, to treat them as if vested; and then, as a consequence of that, to make them subject to the burdens which belonged to the legal estate. Thus, after the statute, it was said that a man could make conveyance to uses, and that the use could change from one to another as before the statute (*Bro. Abr., Feoffments at Uses*, fol. 30).

to be in them that have the use, in such quality, manner, form, and condition, as they had before in the use. Thus the statute executes the use, as it is termed, that is, transfers the use into possession; by which means the *cestui que use* becomes completely possessed of the land in law, as he was before in equity.

No form of words could be imagined more simple, and, at the same time, more efficacious for the annihilation of uses (a), than the purview of this act. By a kind of legal magic, the whole frame of landed property seemed on a sudden to be changed (b); and every man, who before had only the use of his estate at the mercy (almost) of his feoffees (c), was made, in an instant, the complete and lawful owner of it. The parliament seem not to have foreseen that any use could survive the operation of this statute, or any new one be created, except only on a bargain and sale (d); and as soon as that was discerned,

(a) This it has been seen was an entire error. Uses were not *annihilated* by the statute but *vested*, a very different thing, for they were thus effectuated, instead of being annihilated; they were given effect to as transfers, not *only* of the use, but also of the estate. The statute simply *carried out* the principle of the previous act.

(b) This is an instance of the fallacy, which is so frequent in our author, of imagining sudden changes in the law. Generally, as in this instance, the fallacy arises from overlooking some intervening condition of the law; but, in this instance also, the effect of the alteration itself is wholly misunderstood.

(c) This, again, is an entire error. By means of the equitable jurisdiction exercised in chancery, uses were just as sure and safe as legal estates, and in some respects safer and surer. The court of chancery compelled the feoffee to uses to execute the uses, and all that the statute did was to save the *cestui que use* the trouble of going into chancery and change the use into a legal title. But it was *practically* so before, for it was an *equitable* estate, just as good for all practical purposes. There was no such *great* change therefore.

(d) The author has forgot that almost all conveyances to uses, except by the new mode of bargain and sale, were by means of *fines*, which were matters of record, and involved a *registry* of the transfer. The only object of this enactment was to enforce a similar registry of *deeds* of conveyances to uses. In the great case, which is the leading case on the subject, Chudleigh's case, *temp.* Elizabeth, it was said by all the judges, that the statute did not extend to subvert and destroy uses, in other manner than by executing and transferring the possession of the land to them (*Chudleigh's Case*, 1 *Coke's Reps.*, 135). It was there settled that the statute does not transfer any possessions to any use, but only to uses *in esse*, and not to any uses in future or contingency, until they come *in esse* (*Ibid.*, 176). And further, that *until* they came *in esse* they might be destroyed, as they could have been at common law (*Ibid.*). It was also said that uses had been invented in times of trouble by fear, or in times of peace by fraud.

an act was made in the same session¹ to put some guard to these transactions, by requiring them, when they concerned any freehold interest, to be by deed indented and enrolled (*a*). They designed, most certainly, that lands should pass no longer by limitation of use, but by formal livery on the land, matter of record, or some other common-law conveyance, as mentioned in the preamble of the statute.

The courts of law, instead of sending suitors to seek relief in chancery, began now to take cognizance of uses, which were become legal estates; and one would have thought the learning of landed property was, by this statute, once more settled on the pure and simple principles of the common law: how far these expectations were answered, will be seen in the sequel.

There are other material articles in this statute. It is provided² that there shall be a saving to all feoffees of such former right, title, entry, interest, possession, rents, customs, services, and actions, as they might have had at common law: upon which saving much of the reasoning concerning the condition of the feoffees was afterwards founded. Where³ persons have a use or interest in annual rents issuing out of lands, they are to be adjudged in possession and seisin of the rent in such like estate as they had in the use, in the same manner as if they had a conveyance from those who were seized to the use.

There is another clause in this act which deserves a more particular notice; that is, the provision respecting *jointures*. When the statute had ordained that those who had the use of land should be

Jointures.

(*a*) The inference is rather the reverse when the law is rightly understood. The author evidently supposed that conveyances to uses were done away with. On the contrary, they were not only not interfered with at all, but they were confirmed. And thus it was said, in the next reign, that a man could make conveyance to uses, and that the use could change from one to another, as he could have done before the statute (*Bro. Abr., Feoffments at Uses*, fol. 30; 6 *Edw. VI.*). The old modes of conveyance of land to uses by feoffment or fine were, however, often superseded by the new method, which was by private deed; and hence the enactment that such deeds should be registered, that is, so as to make them as open and public as fines or feoffments. Thus the inference is rather that the legislature knew that conveyances to uses would still be the common mode of conveyance, as it had been before; and so, in fact, it has continued to be, being, indeed, the only means of conveyance applicable to the limitation of several successive estates, and especially in wills of land.

¹ Chap. 16.

² Sect. 3.

³ *Ibid.*, 5.

thenceforward considered as *seized* of the freehold and inheritance, it was foreseen that the following case might happen: that, immediately upon passing the act, as every man would become *seized*, there would accrue a title of dower to his wife, who, perhaps, had an estate in jointure made to her on her marriage, and so would now enjoy a double provision, namely, her dower and jointure both. It was thought expedient that this should be prevented; and it was accordingly enacted, that where there are lands settled to a man and his wife and the heirs of the husband, or to the husband and wife and the heirs of their two bodies begotten, or the heirs of one of their bodies begotten, or to the husband and wife for their joint lives, or the life of the wife, or to any person to the use of the husband and wife, or of the wife solely, for her jointure, that, in all these cases, the wife shall not be entitled to dower. But,¹ should she be evicted of all or any part of her jointure, by lawful entry, or action, or even by the discontinuance of her husband, she shall be recompensed by a proportionate endowment out of the residue of his lands. It was also provided,² that where such jointure is made after marriage, the widow may refuse it, and demand her dower. This is the only provision made by statute on the subject of jointures; since which, it has at different times been discussed and resolved, what are the requisites to constitute a perfect jointure, and such a one as will bar dower: the intention of all which seems to be this, that the estate given to the wife in jointure should be equally beneficial with her dower, and that there might be no doubt but it was given in lieu of it.

Another equitable provision was made by the statute of uses, to prevent some untoward consequences which would ensue from the revolution thereby effected. When the person who had the use became seized of the land, his power of devising was of course gone (*a*). Now it might

(a) But not until it had been really exercised, as where a man conveyed to another to his own use for life, then the remainder over in tail, and remainder to his right heirs; there the estate for life would vest in himself, and that would not be the subject of decree, but the other estates would vest and take effect after his death according to his will as thus declared: or again he might convey the fee-simple and retake an estate to his own life (*Bro. Abr., Liverie*, fol. 60). So where a man after the statute had cove-

¹ Sect. 7.

² *Ibid.*, 9.

happen that many persons were under covenants, made on marriage or otherwise, to give some estate by will, which, since the statute, could not be performed. This would produce inconvenience, and often injustice; a saving clause was therefore added, to effectuate wills made before, and within a certain period after, passing the act.

Indeed, the effect that the statute of uses had on the power of devising (a), was one of the most material consequences which followed it. The king's grand object, of preventing the infringement his casualties of tenure suffered by devices, was most effectually attained: Henry had made good the threat he had held out a few years before, which intimated a design to take away the power of devising entirely (b). When this restraint was wrought

nanted that he and his heirs, and those who were seized of his land, should be seized to the use of his wife for life, and then to the heirs of his body, it was held good, and saved the land from forfeiture even in the case of felony (*Bro. Abr., Feoffments al Uses*, fol. 16; 34 *Hen. VIII.*).

(a) It has been seen that it had no effect whatever on the power of devising. There was no such power in a direct manner to devise; there was, indeed, an indirect power to devise by means of uses, and this remained as before. All that the statute did was to vest the estate according to the use so transferred.

(b) There is here the continuance of the error that has been previously pointed out — that the statute interfered with the indirect power of devising lands by means of uses. That power had been upheld by solemn decisions of the courts of law; and what this act did was to recognize and give full effect to it, but to do so in such a manner — i. e., by vesting the use — as to secure the king his feudal service or profits. Secure of those, he of course was quite careless as to the power of devise; and knowing that it was exercised in this indirect way, desired to confer a limited power of doing it in a direct manner, especially as he had no right at all over lands held in socage by persons who did not hold any land by knight-service. As to lands held in socage, he had no claim to feudal services, and therefore no interest in preventing devises. Upon this it was held that a will written out before the testator's death, from notes taken from his mouth, was good, though never read to him (*Brown v. Sackville*, 6 *Edw. VI., Dyer*, fol. 72). In several cases it was held that wills written by others in pursuance of the testator's intentions and instructions were good, though not signed by him, providing he was of disposing memory, and not merely of reasonable mind (*Newdegate's Case, ibid., in notes*). In Hudson's "Treatise on the Star Chamber," however, it is stated that Lord Chancellor Egerton absolutely overruled these cases, and usually condemned wills made *in extremis*, when men had no good disposing memories; and the author added that "infinite examples had happened in a short time to show the mischief which the statute of wills had brought in. *Dyer*, fol. 29, chap. ii., c. 355, all devises of lands and tenements shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express sanction, and be subscribed in his presence by three or four credible witnesses. By the present law of wills two witnesses are required, who must subscribe and attest in the presence of the testator and of each other.

up to its highest pitch, the inconveniences of it were felt too sensibly for it to endure long; and in a few years it was found necessary to allow by express statute the power of devising land, upon the footing that had been proposed by the king some years before.

Accordingly, an act was passed in the thirty-second year of the king,¹ which, from the governing
Statute of wills. idea upon this subject, was entitled, *The act of wills, wards, and primer seisins*, whereby a man may devise two parts of his land. The preamble intimates the grace and goodness of the king towards his subjects in granting them everything which he in his benevolence could confer; and states, as a reason for making this act, that persons of landed estates could not conveniently maintain hospitality, nor provide for their families, the education of their children, or payment of their debts, out of their goods and movables. It ordains, therefore, that all persons having any manors, lands, tenements, or hereditaments, may give and dispose of them, as well by last will, or testament in writing, as by any act executed in their lifetime, in the following manner: If they held in socage, or of the nature of socage, and held none of the king by knight-service, by socage in chief, nor of the nature of socage in chief, nor of any other person by knight-service (a), or if they held of the king in socage, or of the nature of socage in chief, or of any other person, and none of the king or any other by knight-service, they *might devise the whole*, with a saving to the king of his primer seisin, and

(a) A few years before this statute it had been held that if a man seized in use of land held of the king *in capite* married his daughter within age, and died leaving her under age, the land should be in ward, but not the body; but if she was of full age, the king should have a relief, by the statute 4 Henry VII. (*vide ante, et vide c. xxvii.*), and the feoffees need not sue livery of the land. For where land held of the king *in capite* came to him, it should not go out without livery, and in the other case it was not "dying seized," and so it should be no seizure (*Bro. Abr., Liverie, fol. 21*). The heir of him who held of the king *in capite* in socage need not render primer seisin to the king for all his lands, but only for those he held in socage *in capite*; but otherwise of him who held in chivalry *in capite* (*Ibid.*, fol. 60). Primer seisin was where the heir of tenant in socage *in capite* was of full age at the death of his ancestor; livery was where he was under age at that time, and afterwards came of age. He who held of the king in chivalry and not *in capite* need not sue livery, nor should the king have custody of his other lands that he did not hold *in capite*; but if he was of full age, the king should have a relief — otherwise of tenure *in capite* (*Ibid.*, fol. 62).

¹ Chap. 1.

reliefs, and fines for alienation, and all other rights and dues belonging to socage-tenure. If they held of the king in chief by knight-service, or of the nature of knight-service in chief (a), they might devise two parts (b), or as much as should amount to the yearly value of two parts in three, in certainty, and by special divisions, so as it might be known; saving to the king the custody, wardship, and primer seisin of as much of the lands as amounted to the full yearly value of a third, without any diminution, dower, fraud, covin, or cheat, and also his fine for alienation (c). The same if they held of the king

(a) The tenure in chief, or *in capite*, commenced in ancient times, upon the grants of the kings to defend their persons and their crowns against enemies and rebels; and the king at this day could create such tenure, if he received it to his person, but not if he received it as of his manor or castle, for then the service should be *regardant to the manor*, etc. (*Dyer*, 44).

(b) If the devise was of the whole, it was good as to the two first (*Jenkins' Centuries*, 201, fol. 20).

(c) No livery need be sued by any heir if the tenure were not of the king *in capite*, whether in socage or knight-service. For land holden of the king by knight-service *in capite*, if the heir be of full age at the time of the death of his father, he should pay half a year's value of the land; if the tenure were in socage *in capite*, the heir should pay relief; if he was of full age at the death of his father, he should pay nothing. Where the king had a ward because of another ward who was the king's tenant *in capite* by knight-service, and he who was ward because of ward came first to full age, he should save his own livery, but not where his guardian had sued his livery before him, though even then the king should retain the land and body till full age. So should every other lord who had a ward because of ward. The heir of the king's tenant in chivalry, not *in capite*, should, at his full age, after paying a relief, have an *amoveas manus* to recover his lands from the king (21 *Edw. IV.*, fol. 60; 26 *Hen. VIII.*; *Bro. Abr., Liverie and Feoffment al Uses*). It is to be observed that the prerogative only applied to land held in chivalry or knight-service, and not to land held in socage or by certain service; and thus it was held that, where one held land in chivalry and other land in socage of a manor which was held of the king *in capite* by knight-service, and the tenants died, and left heirs under age, it was held that the socage land should not be in ward by the prerogative, because the tenant who died seized did not hold immediately of the king (*Doig's Case, Dyer's Reps.*, 123). The crown, therefore, was not interested in preventing devises of land by will if held in socage and not *in capite*, and therefore the statute 32 Henry VIII., c. i. (1540), gave power to every man seized of land in fee-simple of socage tenure to make devise by his last will in writing of estate lawfully executed in his lifetime, the heir to have the third part of the land. Upon this a question arose whether, if lands were held in fee *in capite* and by fine conveyed to uses declared in a deed, the *cestui que use* should have the whole of the land under the fine, or the heir should have the third part under the statute? (*Morroga's Case, Dyer*, 112). But by the 12 Charles II., c. xxviii., tenures *in capite* were abolished. The prerogative held for all lands held from any lords of which the king's tenant *in capite* died seized, but only of lands of which he died seized; and in such case, if the tenant died leaving an heir within age, or of full age before livery, the land was deemed to be

by knight-service in chief, and had also other land of the king, or of any other, by knight-service or otherwise,

in the king's hands, insomuch that the writ of *devenerunt* was the proper writ to be sued in such case, not a writ of *diem clausit extremum*, for the writ of *diem clausit* commanded the sheriff to seize the lands into the king's hands when they were not then in his hands; and the writ of *devenerunt* recited that the lands of the ward were in the king's hands, and that the ward in his custody *diem clausit*. Where the king's tenant *in capite* died, his heir being within age, and land descended to this heir from another ancestor who held of another lord, the king had no prerogative of these lands; the prerogative only held of lands of which the king's tenant died seized (15 *Edw. IV.*, fol. 11). Hence the resort to conveyances to uses, and declaration of "last wills," that is, of a use for the heir, to whom the land was then re-conveyed; and this deprived the lord indirectly of feudal profits. Hence the statute of Henry VIII., which, however, was limited to cases where no will was declared. In socage *in capite* of the person of the king, if the tenant died, his heir being within age, the ward would be taken into the king's hands, and the next friend of the heir would have livery of it with the issues; but if the heir were of full age, the livery should be sued without the issues, and the king should have primer seisins (*Jenkins*, 127). The common law only applied, it will be observed, as to land of which the tenant died seized, so that if land were conveyed away to uses or otherwise, the feoffor's heir would not be liable to the feudal burdens, but the feoffor's heir might be so liable only if the conveyance were to such uses as the feoffor should direct, and he directed the use by last will to the use of the heir: the beneficial estate would pass to him and equity would direct a re-conveyance, and thus the law would be defrauded. Hence the act of Henry VII., which, however, was limited in its operation. Where tenant by knight-service died, leaving an heir under age, the lord could tender the heir a marriage, and if he refused and married elsewhere, still being within age, and died within age, the lord would be entitled to double value of the marriage; and so if the issue of the marriage had married within age, the lord would be entitled to a single value of the marriage, which was proportioned to the value of the lands (*Keilway*, 174; 11 *Hen. VIII.*). At common law, a king's tenant in socage *in capite* dying seized of the land, and the heir being left of full age, the king would have primer seisins, but otherwise if he conveyed in his lifetime to another; and even after this statute in such cases the king had nothing, for the land had been conveyed to another, and the ancestor did not die seized, so that the common law did not apply, and the conveyance was not within the statute (*Jenkins*, 329). After this statute as before, it was held that if *cestui que use* of land held *in capite* of the king, and of other lands held of others by knight-service or socage, died without will, leaving his heir within age, the king should have his prerogative in all the lands, by the construction of the statute of 4 Henry VII., for the ward of *cestui que use*; for it was ordained that in such case the king should have the wardship as if the tenant had died seized (*Jenkins' Centuries*, 219; *Dyer*, 274). If there was a will declared before the statute of uses or a conveyance to uses, it took effect as will, and barred the lord except as to wardship (*Bro. Abr., Feoffment al Uses*); but a will was something to take effect after death (*Lord Audley's Case*; *Dyer*, 106); and hence if the alienation to uses was to take effect during the lifetime of the donor, it was not a will (*Ibid.*). After the statute of uses, if land were conveyed to one and his heirs, to the use of him and his heirs in trust for the feoffor and his heirs, the king should not, upon the death of the feoffor, have the wardship nor the forfeiture of the land for treason-felony, but if the feoffee died, his heir within age should

with the same saving of custody, wardship, primer seisin, and fines for alienation. If they held some lands by knight-service, and some in socage, or of the nature of socage, of any common person, then they might devise two parts of those held by knight-service, and all those held in socage, with the same saving. If they held only of the king by knight-service, and not in chief, or held by knight-service, and not in chief of the king; and also of another by knight-service; and also of another held other lands in socage, or of the nature of socage; then they might devise two parts of those held of the king, and two parts of those held of the others by knight-service, and the whole of those held in socage; saving to the king and the other lords their respective rights and casualties, as before mentioned.

In all these cases, if the part coming to the king did not amount to a full third, he might take into his hands as much of the other two parts as would make up a clear yearly value of the full third belonging to the king in title of wardship and primer seisin, or the like; and the lord was to have a like advantage respecting his third part for title of wardship; and all persons were to sue their liveries for possessions, reversions, and remainders, and pay reliefs and heriots as before.

It was declared, that if two or more persons held lands of the king by knight-service, jointly to them and the heirs of one of them, and he who had the inheritance died, leaving his heir within age, the king should have the ward and marriage of the body, notwithstanding the life of the freeholder. Lastly, there was a saving of dower out of the two parts, and to the king his reversion of tenants in jointure or dower, if they should happen to die during the minority of the king's ward.

Such is the substance of the first statute of wills. An innovation like this could not be made without giving occasion to an abundance of questions which could not be foreseen by the makers of it; and the present act does not

be in ward; and if the feoffee were attainted for treason or felony, the land was lost. A use was not forfeitable at common law, but was grantable. A trust was neither forfeitable nor grantable, even after the statute (*Jenkins' Centuries*, 219). It seems, then, that after this statute, and after the statute of wills, men might still, without resorting to the powers of the statute of wills, alienate their lands by last will through the medium of uses and trusts, as they did before.

seem to have been framed with all that circumspection which is so manifest in most of the acts of this period. In the course of three years, many of these difficulties had time to make their appearance, and suggest their own remedies. We find in 34 and 35 Henry VIII. an act passed for correcting such defects, entitled, "The bill concerning the explanation of wills."

It is remarkable, that of the many clauses in the former statute which gave authority to different persons to devise, only two of them required any particular description of estate in the testator, and then the description was ambiguous: these words were *of estate of inheritance*, and they were now declared to mean only an estate in fee-simple. The act goes on to supply the defect of the former act, and declares, that all persons having a sole estate in fee-simple, or being seized in fee-simple, in coparcenary or in common, of manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or rents, or services, incident to any reversion or remainder, and having no lands held of the king, or any other by knight-service, might devise the whole. If they held them of the king in chief by knight-service, or of the nature of knight-service in chief, they might devise two parts. To explain a doubt which Montague, afterwards chief-justice, confesses he, among many, entertained that a will of more than two parts would¹ be void, it was declared, that a will should be good at least for two parts, although it was made of the whole, or of more than the two parts. The division of the two parts, if not made by the testator, was to be made by commission, granted out of the court of wards and liveries, a court which was newly erected, and will be mentioned hereafter. This was to be executed by the oaths of twelve men, and a return and certificate to be made to the master of the wards and liveries, who was to decide the matter.

If any held of the king by knight-service, and not in chief, or held of any other by knight-service (not being bodies politic and corporate), they might devise two parts; and any will should be good for the two parts, though made for the whole, and for all other lands not held of the king, nor of any other, by knight-service, nor in chief;

¹ Plowd.

the division to be made, as in the former case, for as much as belonged to any other person, by commission issuing out of chancery.

In explanation of the savings, made in the former act, of custodies, primer seisions, and the like, respecting the third part, it was declared to apply to such lands and tenements as came by descent, as well in fee-tail as fee-simple, or in fee-tail only, to the heir of the testator, immediately after his death; and any will was to be good, notwithstanding it devised all the fee-simple lands: and if such lands, descending either in fee-simple or fee-tail, amounted not to a third, the king, or other lord, was to have as much of the others as would make up the clear yearly value of the third, in respect of his title of wardship, primer seisin, and the like. If the king, or other lord, was evicted of his third part, he was to have the deficiency made up to him out of the other two parts. As to the fines for alienation without license, directed by the last act to be paid by those who took any freehold under such wills, it was declared, that they should be remitted by suing forth the king's pardon, and paying the third of the yearly value of the lands so devised: and the chancellor was hereby empowered to issue such pardons without applying to the king.

It was declared, that a will of lands, tenements, or hereditaments made by a feme-covert, any person under twenty-one years, idiot, or of non-sane memory, should not be good or effectual.

In the spirit of a provision in the stat. Marlborough,¹ it was ordained, that if any person holding by knight-service of the king, or another, or in chief, by will, or other act in his life, gave his manors, lands, tenements, or hereditaments, by fraud, or covin, to any one for term of years, life or lives, with one remainder over in fee, or with divers remainders over for term of years, life, or in tail, with remainder over in fee-simple, to any person, or to his right heirs, or should make by fraud or covin, contrary to the intent of this act, any estates, conditions, menalties, tenures, or conveyances, to defraud the king of his prerogative, primer seisin, livery, relief, wardship, marriages, or rights, or any other lord of his wardships, reliefs, her-

¹ *Vide* vol. ii., c. viii.

iots, or other profits which should arise by the death of any tenant; then, upon office being found, the king should have his right, as if no such estate had been made, until such office be legally done away by traverse, or otherwise. And any other lord might bring his writ of ward, distrain or avow, as the case might be; saving, however, to the donees or devisees their interest after the king and lord were satisfied. Lastly, it was provided, that where the king or any lord took any lands to make up his full third, the person from whom they were taken should obtain a contribution against all persons entitled to the other two parts by bill exhibited in chancery.

This is the substance of the two famous statutes concerning wills of land. Except in the instance of land devisable by custom, devises before these statutes were in consequence of some feoffment to the use of a will, so that the devise made in pursuance thereof gave only an equitable right to be established by the authority of the court of chancery, being, in fact, no more than a declaration of a use; but now, being authorized by statute, a will of land became a new mode of conveyance on the death of the testator, cognizable in the courts of common law. So much of uses and wills, the statutes concerning which are strongly allied to each other in their reason and consequences, and may be considered as a system of constitution forming a remarkable period in the history of landed property.

Thus far of real property. We shall next consider some few particular instances of parliamentary interposition for altering the modes of securing property, and redressing injuries to personal estates, before we come to the general alterations which were made in the administration of justice. First, of the recognizance in nature of a statute-staple; then of bankrupts and usury.

This new security was framed by stat. 23 Henry VIII., c. 6, and was denominated, after the original from whence it was framed, *A Recognizance in the nature of a Statute-Staple*. The statute-staple, as we have seen,¹ was a charge on land, which was contrived as a security to be used by those only who had dealings in the staple; it was, therefore, like the statute-merchant, confined to certain persons

¹ *Vide* vol. iii., c. xiii.

and places. It had, however, by a fiction lately introduced of surmising the debt to have been contracted in the staple, been extended beyond its primary design; and it was now thought expedient, by a legislative sanction, to communicate the benefit of such a security to all persons who chose to avail themselves of it; or rather, without the circuitry of a fiction, to which they before resorted, to frame a similar security for debts, that might be open to persons of all descriptions. This was done by the above-mentioned statute, which gives the form of the recognizance, and directs all the method of proceeding therein. It is to be acknowledged before either of the chief-justices, or, out of term, before the mayor of the staple of Westminster and the recorder of London jointly. The first statute of bankrupts is stat. 34 and 35 Henry VIII., c. 4, and is entitled, *An Act against such* Statute of bankrupts.
Persons as do make Bankrupts. The persons who are the objects of this new provision for the recovery of debts, are described as those who "craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses (a);" so that

(a) It will be observed that the preamble of this act is very much the same as that of the act of Henry VII. against fraudulent alienations of goods and chattels (*vide ante*, c. xxvii.); whence it may be inferred that the scope of this, the first statute of bankrupts, was the same, as indeed is in terms expressed, viz., to meet the case of trader-debtors fraudulently concealing or disposing of their goods to their own use or the use of favored creditors, so as to defraud their other creditors, evading the process of law by withdrawing themselves. The only common law remedy for such a course would be outlawry; that is, if the debtor could not be found by any particular creditor suing him, who, if he could find him, could only levy his own debt, and could only levy it on the goods legally his debtor's. And the effect of outlawry was to vest the property and assets of the debtor in the crown; not, however, for distribution among the creditors, but only as a penal process to compel the debtor to satisfy the creditor suing. And this again could only apply to the legal property of the debtor. This statute, the earliest on the subject, contains the first germs of the law of bankruptcy as afterwards established, and perhaps embodied all its essential principles. Its fundamental principle was that, in the case of fraudulent debtors, that is, debtors evading payment of their debts, or concealing or unfairly disposing of their assets, there should be a compulsory administration and distribution, on the basis of a statutable equity or equality among all the creditors. Of course this involved a compulsory collection of the assets; and hence the two great features of a bankruptcy law have always been, a collection or realization of the assets, and then administration or distribution. The first, of course, would necessarily precede the second; and it was in the first the present measure was defective, for it merely provided generally that the chancellor, etc., should "take order" in the matter. What should be done in the matter appears to have been left wholly uncertain, and especially as to who

the statute extends to all persons whatsoever who act as above described. A new and peculiar method of dealing with these defaulters is directed: the chancellor, or keeper of the great seal, the lord treasurer, lord president, privy-seal, and others of the privy council, the chief-justices of both benches, or three of them at least, whereof the chancellor or keeper, the treasurer, president, or privy-seal, were to be one, upon complaint in writing by a party grieved, were to take order concerning the lands and goods, and also with the body of such *offender*, for so he is named; and they were either to sell his effects, or make such disposition of them as they should think meet, so as every creditor had a rateable portion according to his demand; and such sale and direction was to be as good in law, as though made by such offender himself. They were authorized to call persons before them, and examine them upon oath touching the offender's goods. Persons con-

should be the authorities practically to execute or carry out the law, and what powers they should exercise. Probably for this reason the act does not seem to have been of much practical effect, and it is impossible to discover any traces of it in the books. It was superseded by an act of Elizabeth, and although no doubt the statute of Henry VII. avoided fraudulent alienations of property for the use of the debtor himself, it did not avoid such alienations for the benefit of others, particularly favored creditors. Thus, therefore, there were these grievances in the law: the withdrawal of debtors so as to evade legal process, and put creditors to the dilatory circuitous procedure of outlawry, which vested the goods in the crown, not the creditors; and the withdrawal of the assets by fraudulent alienations for the benefit of favored creditors. Hence it is obvious that the only remedy would be, in such cases, a summary proceeding, by which the property should be at once seized and secured for the benefit of all the creditors, and by which all unfair alienations, even to favored creditors, should be avoided. Hence the present act. Upon this clause a curious case arose. A process issued against a man to arrest him, he keeps his house to save himself from arrest, and afterwards goeth out to the market and to other places; and when he heareth again of a new process out against him, he keeps his house, and afterwards goeth at large. The question was if he were within the statute of bankrupts? And all the court held that he was not, because he used to go at large, and it might be that his policy would not prevent the serving of the process, for he might be met withal unwittingly (*Anonymous Case, Cro. Eliz.*, 13). It would appear that the court considered that bankruptcy, in such cases, at all events, was analogous to a species of summary outlawry, which involved a seizure of all property in cases where ordinary process could not be executed; so that, while there remained such a clause of executing it which would be deemed to exclude outlawry, there could be no bankruptcy. This is a curious illustration of the narrow view with which bankruptcy was at first regarded by the common-law courts, who did not grasp its great principle as a kind of statutable equity. (See the subsequent statutes 13 Eliz., c. vii.; 7 James I., c. xv.; 5 Geo. II., c. xxx.; and *vide* Salk., 116; Strange, 809; and 2 F. R., 59, *contra*.)

cealing effects of the offender were to forfeit double the value of them, to be recovered by such means as the lords should think proper: and persons making false claims of debt were to forfeit double the sum demanded.

If such offender left the kingdom, the lords were to issue a proclamation commanding him to surrender; and if he did not comply within three months after he had notice thereof, he was to be adjudged out of the king's protection; and in such case, should any one help to convey to him his effects out of the realm, he was to suffer such fine and imprisonment as the lords should think proper to inflict.¹ The act further directs, that after a man was by these means stripped of all his property, he was still to be liable to all unsatisfied demands, as before that act was made.

This is the first draught of that species of summary execution against the person and effects of a debtor which has since been modelled into a very different shape. At present the bankrupt was considered as a criminal, whose delinquency could be expiated only by paying the last farthing. Later statutes have, besides the payment of his creditors, provided in some measure for his interest, rather viewing him in the light of an unfortunate man: upon that idea his compliance with the direction of the several statutes is rewarded by an immunity from his former encumbrances,² and an allowance to enable him to try his success in the world once more. These qualifications of the rigor of the first bankrupt law have been added since their operation has been confined totally to *traders*; though, perhaps, a general policy, as well as a consideration of the casualties attending trade and commerce, would dictate such a provision. However, as the first bankrupt law completely ruined the man who was unhappily the object of it, the modern regulations are looked on by many as holding forth to a designing trader an unmerited indemnity, if not a prospect of gain at the expense of his creditors; and this has tempted many to court a situation and character, from which, in the reign of Henry VIII., they would have shrunk with horror; so that, if the severity of the first bankrupt law was carried too far, the opportunity of imposing on the ease of modern ones by

¹ Sect. 5.

² 2 Blackst., ch. 31.

fraud and collusion makes many doubt of their benefit to the community.

The prejudices against usury are worn off; and a rational commerce had taught the nation that an estate in money, as well as an estate in land, might be let out to hire, without the breach of one moral or religious duty. The parliament concurred with the opinion of the times, and by stat. 37 Henry VIII., c. 9, all former acts¹ against usury, as an offence, were repealed; and a certain sum to be given for the loan of money was permitted, under the following terms and precautions: In the first place, it was by this statute enacted that no person should sell his wares or merchandise, and within three months buy them again at a lower price; nor should any one by means of any corrupt bargain, loan, exchange, chevisance, shift, interest of any wares, merchandises, or other thing, or by any other corrupt or deceitful way or means, or by any covin or conveyance, receive or takè for the forbearing or giving day of payment for a year for his money or other thing due for the said wares or merchandises, or other thing, above £10; nor should sell, bargain, or mortgage any lands upon any higher interest: and those who transgressed in any of these points, were to forfeit treble the value of the thing bargained for, and suffer fine and imprisonment at the king's pleasure. The provisions of this act have undergone some qualifications by later statutes.²

In speaking of the administration of justice, we shall first mention certain new courts, which were erected by parliament; some of these concerned criminal matters, and therefore will be more properly noticed hereafter; others, which were of a civil nature, may very properly be placed here: they all related to the better collection and management of the king's revenue.

The dissolution of religious houses opened a new source of revenue to the crown (*a*); for the governance of which

(*a*) This was a measure which, there can be no doubt, was viewed with aversion by lawyers, as utterly contrary to legal principle, to say nothing of moral justice; and the strictest construction was placed upon it. If the measure had been passed with any real regard to the welfare of the state, or with any other object than to enrich a rapacious monarch, it would have been a measure simply enacting that no persons in future should be admitted into any religious houses — the result of which was, that as the existing members died,

¹ 20 Hen. III., c. 5; 3 Hen. III., c. 5, 6; 11 Hen. VII., c. 8.

² Stat. 2 and 3 Edw. VI., c. 20; 13 Eliz., c. 8; 31 Eliz., c. 5, etc.

was erected by stat. 27 Henry VIII., c. 27, *The Court of Augmentation of the Revenues of the Crown of England*. This

the houses would become at last dissolved by lapse of time and the force of law. For it is curious that in more than one case in the Year-Books of the preceding reigns, it had been laid down that if all the monks of a house should die, the house would be dissolved (*Year-Book, Edw. IV.*). In this way it is obvious the abolition of religious houses would have been effected without that violation of legal principle, and that odious moral injustice, and that enormous amount of personal misery, which resulted from the arbitrary measures adopted by the king. It is said, by the king; for it need hardly be stated that most of the religious houses had been, in fact, obtained and abolished by the king before the act of parliament. The means adopted to obtain them, it is well known, were enforced surrenders, which were of no legal validity — first, because they were enforced, and next, because no one can surrender except either to a reversioner or to a donor; and the king was neither the one nor the other. In law he was a mere stranger, and a surrender to a stranger is a new legal anomaly. The supposed surrenders, therefore, were all null and void, and grievous pretence of legal title. The king *had* the religious houses *de facto* by bare acts of spoliation and rapine, without a pretence of justice or of law. And probably the sanction of parliament was sought for the sake of purchasers or lessees. It is observable that the statute was framed in terms extremely cautious and almost subtle — carefully abstaining from any words of donation or grant, or confirmation or approbation of the means or measures taken. It enacted that all the monasteries, etc., which had been dissolved, etc., and come to the king, and all other monasteries, etc., which *shall happen* hereafter to be dissolved, suppressed, surrendered, etc., or by any other means come to the king, *as soon as they shall be dissolved, suppressed, etc.*, shall be vested, decreed, and adjudged, by authority of parliament, to be in the possession of the king; a most remarkable form of enactment, which left it entirely open whether or not any of these houses had been legally dissolved (no lawyer for a moment would suppose they had been legally surrendered), and cautiously enacted that whenever they *should* be dissolved, or *by any* means come to the king — by any means, fair or foul, legal or illegal — why, *then* they should be adjudged to be in his possession; a form of enactment plainly indicative of the gravest doubt on the part of the framers of the act whether the religious houses during the lives of the members were legally dissolved, and also a great disinclination to give the sanction of statute to the *legality* of the “means” by which the house should come to the hands of the king. What those means were may be read in Hume or Lingard: they were simply murder and terror of murder. The framers of the statute knew too well what these means had been, and hence carefully forbore to countenance them; and it is most remarkable what a strict and rigid construction was put upon it by the courts. In the first year of Elizabeth it was held, for instance, that a party claiming lands of a monastery under the crown *must show when it was dissolved*, and that it was dissolved in the time of Henry VIII.; for, said the court, the act only says that houses dissolved should be deemed in *his* possession, which meant houses dissolved in his time (*Wrotesley v. Adams, Plowden's Reps.*, 194), a construction similar to that which seems to have been placed upon the act for confiscation of chantries, and in consequence of which another act was passed in the reign of Edward VI. So it was held that the act only applied to religious houses, *i. e.*, houses of regular orders. It was held that, as the act gave the king such religious and ecclesiastical houses as were dissolved or should be dissolved, it only gave him *religious* houses, and not ecclesiastical houses; for no bishopric, deanery, or deaconry, etc., or such

was a court of record, with a seal; a person was to be appointed and called chancellor of the court of augmenta-

like ecclesiastical and similar corporation, was dissolved before, therefore no ecclesiastical house which was not *religious* was within the intent and meaning of the act. And so it was held that if the house were not *religious* and *regular*, it was not within the act (*Archbishop of Canterbury's Case*, 2 *Coke's Reps.*, 48); a very remarkable instance of a strict and rigid construction of a confiscating statute. It was held that the word "late" in the discharging clause of the act 31 Henry VIII., construed according to the body of the act, extended to such religious houses as came to the crown by that act, whether before or after it; but that the clause extends only to such religious houses as were vested in the crown by the act (*Ibid.*, 41). The general purpose of the act (it was said long afterwards, in a case which arose upon it) was to establish monasteries in the king by act of parliament, howsoever they came to him by other means, as by dissolving, suppressing, renouncing, forfeiture, or surrender, or by any other means, or other imperfect or *questionable* means (*Hobart's Reps.*, 228). Next, the law did establish them in the crown, and gave actual possession, accompanied with all liberties, privileges, discharges of titles, and the like exemptions, immunities, and other endowments whatsoever, even such as were peculiar and personal as would else have perished with their body, in which they were first appropriate, as appropriations of benefices and the like. This care was to make the lands of the monasteries to be more desired of the subject, which was the king's purpose to invite all men to take of them, and to lay a bait of riches and commodiousness upon them, but this was only to bring them well to the crown. Now, the next care was to bring them from the crown to the subject, with as much security as possible; and thus the statute not only makes good grants to the king, but also grants by the king to the subject. And there is a saving of the rights of all persons other than the king and his successors, and the donors, founders, and patrons, their heirs and successors (*Needler v. Bishop of Winchester*, *Hobart's Reps.*, 229). It is to be observed, in passing, that even supposing the spoliation of these houses could be legally or morally justified, their annexation to the crown was simply an act of rapine; for if the purposes of the original foundation failed, then (except in those few cases in which the crown was founder), the lands ought, upon legal principle, to have reverted to the heirs of the founders. This was the principle of the common law, affirmed by ancient statutes, and embodied in the ancient writ of cessavit, which had been established to enable the heirs of the donor to recover lands given for religious purposes, which failed, and which, it had been held, only lay for the heirs of the donor (*vide ante*, vol. iii., c. xv., p. 252; and *vide* vol. iv., 355, as to the act abolishing chantries). In the case cited from Hobart, it was said, "The power and act of transferring things from one to another is *juris naturalis*" (which, however it is to be presumed, meant things which belong to the party transferring); "but that the forms and manners to be observed in the transferring of them are *juris positivis et civilis*. That is" (it is further said), "kingdoms and commonwealths have, by a law written or unwritten, established forms, which are made part of the substance of the grant, though still having respect to the institution of natural equity; they are not material but formal, the very matter and substance of every grant being nothing else but a declaration of the owner's will to transfer that which is his to another. So the supplying of these forms was the end and purpose of the statute" (*Hobart's Reps.*, 229). That is, be it observed, the forms of the grants by the king to the subject, which was the object of the second part of the statute, the effect of the first being to vest the legal possession of the lands in the crown, however they came to it, and whatever the means used, which, it is plainly inti-

tions. There was beside to be a treasurer, attorney, solicitor, several auditors and receivers, with clerks, and

mated by Lord Hobart, albeit a crown lawyer, living under a despotic sovereign, James I., were questionable. Upon that great question how far even acts of parliament confirming such acts of spoliation can be justifiable, the insertion of some admirable observations of Sir James Mackintosh will be excused. However, to recur to the purely legal incidents of the measure for the annexation of the lands of religious houses to the crown, it is to be observed that the statute gave, by the longest possible words, all benefits pertaining to the lands and houses, and *inter alia*, the churches, chapels, advowsons, and patronage of the houses, which must, it was said, be understood of the churches, as they were in them, either appropriate where they were so, or their advowsons where they were not; and it was notorious that a great part of their yearly profits did consist in appropriations, for it was easy for them to get advowsons, and as easy to get them appropriate (*Hobart's Reps.* 308). It is manifest, as is there added, that it was the clear purpose of the statute to give the king all that the abbeys had; and therefore the saving clause excluded the founders, patrons, donors, etc. (*Ibid.*). This last line plainly implies that but for that extension their rights would have been saved, and would have taken precedence of those of the crown. It is to be observed that there was an earlier act, 27 Henry VIII., giving the crown the smaller houses; and as it had been said that when a religious house was dissolved any appropriation annexed to it was destroyed, so it is said in the case cited from Hobart, "All the appropriations of abbeys that were surrendered between the 27 Henry VIII. and the 31 Henry VIII. were *ipso facto* dissolved with the dissolution of the corporation, and were presentable, and might have new incumbents; but as soon as the statute of 31 Henry VIII. came, the appropriations were restored and given to the king" (*Hobart's Reps.*, 308). It is to be also observed that the act of 31 Henry VIII. applied only to the religious houses which had come to the king since the 27 Henry VIII., or should come to him; and hence it was held that the exceptions, etc., did not apply to the lesser monasteries suppressed by the 27 Henry VIII. (*Ibid.*). In the same way it was held that the chantry lands given by 1 Edward VI. did not come within the stat. 31 Henry VIII. (*Archbishop of Canterbury's Case*, 2 Coke, 47). With regard to discharges of tithes, the act 31 Henry VIII. exempted from tithes the lands of all religious houses which had come to the king by dissolution or other means since the 27 Henry VIII., or which should come to him (*Hopson v. Barefoot*, 11 Mor., 238). But it is to be observed, that there were five ways of discharge from tithes—order, composition, bull or canon, unity, and prescription; as to which it was held that the first three were preserved by the clause of discharge in the statute 31 Henry VIII.; the fourth, unity, was created by that act; and the fifth, prescription, stood, as it did before, by the common law, and had no need of any statute (*Wright v. Gerrard*, *Hope*, 319). And under this last head came land held by spiritual persons in right of these benefices, for spiritual persons at common law never paid to these, since they themselves did the services which the tithes were to support; and this non-change, standing upon prescription, was inherent in the land itself, and required no statute, and hence even as to the lands of the lesser houses within the discharging clause of 31 Henry VIII. were held free from tithes. With regard to appropriations, it is to be observed that many of them were annexed to nunneries or convents of women, as well as to monasteries or convents of men; which, it was said, was so contrary to legal principle that the appropriations were in law null and void; for it was said, that the proper legal words to create an appropriation (as distinct from an advowson, or right of

other necessary retainers to a court. Another was established by stat. 33 Henry VIII., c. 39, called *The Court of*

presentation) was to make the patron and his successors perpetually parsons, which, in the case of a convent, would be the prioress and her successors, and this, it was said, was utterly void, for a woman could not be a parson (*Hobart's Reps.*, 148). The same objection, however, would apply to appropriations to monasteries, for they were not necessarily clerics, and might all be laymen, and indeed, merely as monks, they were laymen. However, it was held that, by virtue of the act 31 Henry VIII., all appropriations *de facto* enjoyed by religious houses, whether of men or of women, were transferred to the crown (*Hobart's Reports*, 148). Properly speaking, indeed, as was laid down in a case in the reign of Elizabeth, none but a spiritual body politic which hath succession is capable of an appropriation; for the effect of an appropriation, it was said, as to its original institution, was to make some body perpetual incumbent, and as such to have the rectory and the houses, glebes, and tithes which belong thereto. And in that he is made parson, he has the cure of souls, and so ought to be a spiritual person. For as a patron ought to present to a church a spiritual and not a temporal person, so for the same reason an appropriation ought to be made to a spiritual and not to a temporal person, for the one has cure of souls as well as the other, and there is no difference between them but that the one is parson for life, and the other and his successors are parsons forever. And therefore, appropriations were originally made to abbots, priors, deans, prebendaries, and such as could minister the sacraments, and perform divine service, and to none else. And upon this principle it was that, as to this day, an incumbent cannot transfer his incumbency, so an appropriation could not be transferred to another. And it was observed, not without good reason, for it contains a perpetual incumbency (which is a spiritual function) appropriated to a certain spiritual person, which could not by law be removed from them to whom the church was first appropriated by any grant afterwards made by them. And although originally appropriations were only made to such spiritual persons as could minister the sacraments, and perform divine services, as abbots, priors, deans, and the like (a great error, for abbots and priors might, with every monk in their house, be laymen), yet, in process of time, they began by degrees to shake off that restraint, and were afterwards made to others, as to deans and chapter, which was a body corporate, consisting of many persons, which body cannot together say divine service (a great error, for the whole body could join in the celebration of divine service, and constantly did so,—but a wretched fallacy, even if correct in point of fact, for the members of the body could perform the services), and to nuns who were prioresses of any nunnery, and could not administer the sacraments nor say divine service to the parishioners, and this, it was said, by the crown lawyers and judges, who cheerfully joined in giving all the appropriations to the crown, was a great iniquity “grande nefas,” as Dyer termed it. “And in order to supply these defects in the persons to whom such appropriations were made, who could not themselves perform divine service, a vicar was afterwards devised, who was deputed by priors or deans and chapters to say divine service for them, and he had but a small portion allotted to him, and they to whom the appropriations were made retained the great income and did nothing for it,” which was just what the king did under this statute by the aid of the judges, who gave the appropriations to him at the very time they were laying down that only a spiritual body politic could have an appropriation; added to which, they laid it down, which was no doubt clear law, that the bishop, as well as the patron, must consent to an appropriation, “as the act of appro-

General Surveyors of the King's Lands. This was to be a court of record, and to have a seal. Several persons were

riation is a spiritual thing." How, then, could the king have appropriations? Thus, "And that which the ordinary of the diocese might do, the same was used to be done by the pope as supreme ordinary, who claimed to himself supreme jurisdiction, which was allowed within the realm." In consequence of this he used to make appropriations without the bishop, which were taken to be good; and the bishop, who was only looked upon as an inferior ordinary, never opposed the practice, but accepted them as good. And so an appropriation by the pope alone, without the ordinary, was taken to be good. And the pope used to make provisions, until restrained by statute, and a provision was a designation of the person who should be incumbent, and an admission, institution, and induction of him without going to the bishop. So that his authority was looked upon as absolute, and bound the bishop as his inferior in all his acts. And so it was agreed by the whole court. And it was added: "And such authority and jurisdiction as the pope used to exercise within this realm was acknowledged by the parliament in 25 Henry VIII., and in other statutes, to be in Henry VIII., so that he might lawfully exercise such jurisdiction as the pope used or was accustomed to exercise within the realm. And from him this authority descended to King Edward VI., who made the appropriation here; so that he, being supreme ordinary, might make an appropriation of his own authority and jurisdiction without the bishop, for which purpose he inserted in his charter the words, 'by our royal authority, supreme and ecclesiastical.' And such other like acts of authority and jurisdiction he might do which the bishop of Rome was used to do in this realm." Wherefore all the judges agreed that an appropriation made by the king alone, without the bishop, was as good as if the bishop had made it, or as it was taken in ancient times to be when the pope made it (*Grendon v. The Bishop of Lincoln, Plowden's Reps.*, 496). So as the crown could create appropriations, of course it could take them valid or invalid; and so it was held. The act for the annexation of the religious houses to the crown contained or led to some important changes in the law. It contained a provision which made leases then made of the possessions of religious houses, which should afterwards come to the king, to be void, if another lease for years at the making thereof was in being; the reason of which was declared by the court in the first case which arose upon it to have been, that when men saw that all abbeys were likely to be suppressed, they took new leases for a very long time, and the abbots and other governors were content to enlarge the leases of their farmers, who were their friends, and of their acquaintances, for a very long time. And it was said that the intent of the act was to make such leases good for a reasonable time, *i. e.*, for twenty-one years only, instead of for fifty years, as in that case, or any larger period (*Fulmerston v. Steward, Plowden's Reps.*, 107). Then there was the act enabling assignees to use on the covenants of leases (*Vide post*). In the reign of Elizabeth a question arose under the 31 Henry VIII. as to the College of Ottery St. Mary, which was surrendered to the crown in that year, and the college had made a lease of certain lands the year before for eighty years, there being a copyhold estate for life in a stranger in the same land; and it was held that the case was within the statute, that the lease was invalid, and that the crown should have the land notwithstanding the lease (*Heydan's Case, Moore's Reps.*, 128). It is to be observed that, by virtue of the confiscation of the religious houses, the crown acquired not only a vast quantity of lands, manors, etc., but also a vast number of appropriated benefices and their glebes, and these were, as well as the lands, distributed among laymen, with the object, or at all events

to be appointed and called the general surveyors of the king's lands, which several persons were to constitute only one officer. The treasurer of the king's chamber was always to be treasurer of the revenues of this court, and was to rank next to the surveyors: the next officer was to be the king's attorney of this court; the next was master of the woods; then followed the several auditors and receivers: clerks were to be appointed, with other necessary appendages to a court. All such lands, and no other, as were mentioned in a schedule, signed with the king's sign-manual, were to be within the order and governance of this court. Henry afterwards, in the 38th year of his reign, dissolved both these courts by letters-patent; and by letters-patent erected a new court of augmentation: both which acts of authority have been held contrary to law, and to require the confirmation of parliament to give them force, as was afterwards done by stat. 7 Edward VI., c. 2. But the date of this re-establishment was short; for Queen Mary, according to power given her by stat. 1 Mary, c. 10, did, by letters-patent in that same year, dissolve this court; and the next day, by other letters, *united the same* to the exchequer: which last step was resolved afterwards¹ by all the judges to be utterly void (*a*), as there remained

the effect, as Sir J. Mackintosh observes, of strongly interesting a large class of persons to uphold the religious revolution prepared for in this reign and effected in the next. The most influential persons in the kingdom shared these lands and livings; and this, as historians point out, had an immense effect in enlisting support for the religious changes which afterwards took place. It is a curious circumstance, for instance, that Edward VI. gave Sir W. Cecil, who was Elizabeth's chief minister, the rectory of Wimbledon, and he actually lived in the parsonage. An important decision was given towards the close of the reign, which must have had a wide application. The king leased a rectory to a layman for a certain rent, and granted to him that he should be discharged of all pensions, portions, and sums of money, etc. It was decreed in the court of augmentations that the king should find the curate; and it was also held that if a common parson leased a rectory without such words of discharge, still he should find the curate; for that it is a spiritual administration, and the service was annexed to the person of the parson, and was not issuing out of the parsonage (*Dyer's Reps.*, 15; 36 *Hen. VIII.*).

(*a*) What was meant, no doubt, was that the jurisdiction exercised by the court should be exercised by the exchequer, though probably in that sense the enactment would be unnecessary, for at common law the exchequer has jurisdiction to entertain suits against the subject for encroachment upon any of the royal parks or forests. In our own times there have been many informations in the exchequer of that nature. Thus, for instance, there have been in all our times informations for intrusion into or encroachments upon forests. There has been, however, established in our time a Board of Woods

¹ *Dyer*, 4 *Eliz.*, 10.

after the dissolution no court to be united.¹ Such was the fortune of these two courts.

By stat. 32 Henry VIII., c. 45, a *Court of the First-fruits and Tenths* was established. This was a court of record, with a seal, the principal officer of which was to be called chancellor of the first-fruits and tenths. There was to be a treasurer of the first-fruits and tenths; the third person in the court was to be the king's attorney of the first-fruits and tenths: there were to be auditors and clerks, messengers, and other retainers. This was dissolved by stat. 1 Mary, sess. 2, c. 10, and the clergy exonerated from these payments by stat. 2 and 3 Philip and Mary, c. 4; and though the crown resumed the first-fruits and tenths by stat. 1 Elizabeth, c. 4, yet the court was not revived.

For the survey and management of the valuable fruits of tenure, a court of record was erected by stat. 32 Henry VIII., c. 46, called *The Courts of the King's Wards*. To this was annexed, by stat. 33 Henry VIII., c. 22, *The Court of Liveries*, so that it then became *The Court of Wards and Liveries*. This, like other parts of the king's revenue, was before under the government of the exchequer.

This judicial establishment had a longer continuance than the other novelties of this sort projected by Henry

and Forests for the care of the crown lands, and a Board of Works for the care of the crown palaces and buildings belonging to the crown. The judicial functions of this court were exercised far earlier as regards revenue than as regarded the private rights of subjects. In the receipt of the exchequer, the records of fines, etc., were removed about the time of Henry IV. (*Year-Book*, 37 Hen. VI., fol. 17). The law appoints the receipt of the exchequer to be the place where the king's revenues shall be received (4 Coke, 74). The receipt of the exchequer has long been separated from the judicial part of it, and it was probably in the former that the jurisdiction to mitigate fines belonged (8 M., 618, *in notes*), unless where it could be done on principles of equity, the court being, for revenue purposes, one of equity as well as law. In this court, office is found as to king's lands, etc. (10 Coke, 115). The bounds between its jurisdiction and that of queen's bench are not, perhaps, quite clearly settled, since it should seem that information of intrusion into the crown lands may be brought in either court, as cases of intrusion in the king's bench are to be found in Coke. But though, in some cases, there may be a common jurisdiction as regards the punishment of forcible wrong to the crown, to the exchequer alone belongs the actual enforcing of restitution to the crown, or the recovery of crown revenue, as taxes, duties, and the like. Information in the exchequer is well settled (*Mod.*, 276). Informations *in rem* are solely in the exchequer, and the control of condemnations by excise or customs, save where there is no jurisdiction (*Scott v. Shearman*, 2 W. Black, 977), as then it becomes a mere matter between subject and subject, and so pertains to the common jurisdiction of the courts.

¹ 4 Inst., 122.

and his parliament. It continued as long as the object of its judicial cognizance had existence, exercising this jurisdiction with great vigor till the abolition of tenures. An establishment of such importance deserves, therefore, some more particular notice among the innovations in our juridical polity.

This court, as appears by the preamble of the act for establishing it, was not only for the management of wards properly so called, but also of idiots and fools natural in the king's custody, and also for licenses to be granted to the king's widows to marry, and fines to be made for marrying without his license (a). For managing such persons and their property, a court of record, with a seal, was thereby erected, to be called *The Court of the King's Wards*. A chief officer was to be appointed by the king, to be called *master of the wards*, who was to keep the seal; then another, called the king's attorney of the wards, the king's receiver-general of the lands of the wards, and two others, to be called auditors of the lands of the wards. All lands, and other hereditaments whatsoever, belonging to such wards, were to be in the order, survey, and governance of this court. The master of the wards was authorized to issue such process as was then in use in the king's duchy chamber of Lancaster, held at Westminster, for any matter or debt touch-

(a) It was held in the reign of Elizabeth that the statute of 32 Henry VIII., xl., erecting the court of wards, did not give authority to grant wards when they should happen afterwards, but only of wards in possession during their minority (*Dyer's Reps.*, 44). In another case, tenant in chivalry of a manor held *in capite* of one who was a minor, and found to be in wardship, and whose wardship the queen had granted, excepting wards and marriages; the tenant in chivalry dying leaving a son under age, the question arose, whether the queen should have the wardship? and it was held that she should (*Dyer's Reps.*, 44). In another case, where the grantee tendered a marriage, which was refused, it was held that he could not retain the land (*Ibid.*, 66). The queen granted a marriage and guardianship of the person of a ward, reserving the land; the grantee of the guardianship tendered a marriage, which was refused; upon which the grantee prayed to be allowed to retain the land to the full age of the heir. But the court said that the act of 32 and 33 Henry VIII., for erecting the court of wards, did not give authority to retain, but to sue livery, and that the ancient statute of Marlbridge (*vide ante*, vol. ii.) only gave the value of the marriage when the guardianship of the person and of the estate was severed (*Dyer's Reps.*, 66; 9 *Eliz.*). The court thus established by the above statute to exercise the jurisdiction over the feudal wards of the crown extended its jurisdiction, but was ultimately abolished. After the court of wards was taken away, the jurisdiction over lunatics and idiots reverted back to the court of equity, to whom it originally belonged (*Corp. of Bedford v. Lenthall*, 2 *Atk.*, 553).

ing or arising from such property. He was to hold a court at the times of the four terms, and all process from the court of exchequer upon this head was in future to be void. The authorities through the act are mostly given to the master, with the advice of the attorney, receiver, and auditors: they had power to take recognizances, and to commit to prison. By stat. 33 Henry VIII., c. 22, all transactions relating to the king's liveries were brought within the survey of this court, and the master of the king's wards was thenceforth to be *the master of the king's wards and of the liveries*; a person was also appointed, to be called surveyor of the king's liveries, who was to take precedent next before the king's attorney of the wards.

The stat. 33 Henry VIII., c. 39, for erecting the court of surveyors of the king's lands, contains numerous provisions applicable to all the before-mentioned courts, and also to that of the duchy, and court of exchequer: we shall take notice only of the following very general description of their jurisdiction. It was ordained, that all manner of debts, detinues, trespasses, accounts, reckonings, wastes, deceits, negligences, defaults, contempts, complaints, riots, quarrels, suits, strifes, controversies, forfeitures, offences, or other things, arising in, for, or upon any matter, cause, or thing, committed to the order and governance of any of these courts, wherein the king was only party; and also all manner of estates for term of years, between party and party, concerning the premises, were to be cognizable in these courts respectively, with power to correct and punish all persons convicted of any of the above offences. There was an exception out of the above general words, of all treasons, murders, and felonies, of estates, rights, titles, and interests, as well of inheritance as of freehold, other than jointures for term of life. All suits, bills, plaints, informations, declarations, complaints, answers, replications, allegations, causes, matters, and issues, were to be pursued, made, and tried in such several courts, by due examination of witnesses, writing, proof, or by such other ways or means as by the several courts should be thought expedient.¹

Such was the extensive authority given to these new tribunals, among which the court of wards and liveries

¹ Sect. 57, 59.

was most distinguished, from the interesting nature of the subjects of cognizance there, which involved the concerns of so many of the king's subjects, in an article of such serious consequence to them and their families.

Some attention was paid by the parliament to the administration of justice; and several acts were passed in order to remove obstacles and expedite the proceedings and process of courts. Process of outlawry was allowed by stat. 23 Henry VIII., c. 14, in actions on stat. 5 Richard II. of forcible entries; and the process of debt allowed in actions of covenant and annuity. By chap. 15 of the same statute, costs were given to defendants upon nonsuit or verdict, with the same process and execution for recovery thereof as plaintiffs would have (a). This was in the following actions: on the statute of forcible

(a) The subject of costs is of great practical importance, as the liability to pay costs is the most effective check upon unwise or dishonest litigation, whether in making unfounded claims or resisting just demands. The statute of Gloucester had made provision for the payment of costs by defendants, upon recovery by the plaintiff of damages; and the above is one of a long series of statutes designed to carry out the principle that each party to a suit should pay the expense of litigation he has occasioned. The first in the series, after the statute of Gloucester, was the statute of Henry VII., which gave plaintiffs costs occasioned by proceedings in error, by which execution might be delayed. Then followed the above statute, giving costs to defendant in case of verdict or nonsuit. By 4 James I., c. iii., "an act to give costs to the defendant upon nonsuit of the plaintiff, or verdict against him," the former act was extended to any other action in which the plaintiff might have costs, if the judgment should be against him. And in 8 and 9 William III., c. xi., "an act for the better preventing frivolous and vexatious suits," it was enacted (sec. 1), that where several defendants are sued, and one or more of them are acquitted, every one so acquitted should recover his costs, as if a verdict had been given against the plaintiff, and acquitted all the defendants, unless the judge should certify that there was a reasonable cause for making such persons defendants; and sec. 3 gave the plaintiff his costs in some actions, established since the statute of Gloucester, as actions on the stat. 2 Edward VI., for not setting out tithes, but only applied when there was a verdict (*Barnard v. Moss*, 1 *T. H. Par.*, 107); and it seems that, under the stat. 8 and 9 William III., c. xi., sec. 3, which gives the plaintiff his costs in an action for the treble value of tithes, the plaintiff is only entitled to such costs after plea pleaded, or joinder in demurrer, and not in case of a judgment by default (*Bale v. Hodgetts*, 1 *Bing.*, 182; 7 *Moore*, 602). The 8 and 9 William III., c. xi., recited that, for want of sufficient provision by law for the payment of costs of suit, evil disposed persons were encouraged to bring frivolous and vexatious actions, and others to neglect the due payment of their debts, and then it proceeded to enact that costs should be given against either party on judgment or demurrer. The 9 Anne, c. xvi., sec. 4, contained an additional enactment to the same effect. Various other enactments have carried out the same principle, that each party shall pay the expense of litigation he has occasioned.

entries, 5 Richard II., in debt or covenant upon any specialty or contract, detain of goods, in accompt, trespass on the case, and action upon a statute for a wrong to the plaintiff. There was a proviso added, that plaintiffs suing *in formâ pauperis* should not hereby be made liable to pay costs, but should, instead thereof, suffer some punishment at the discretion of the justices; and this punishment, we are informed, was usually whipping.¹ Again, it was provided, by stat. 24 Henry VIII., c. 8, that this act should not give costs against any plaintiff suing to the use of the king. By stat. 21 Henry VIII., c. 19, costs and damages are given to an avowant in replevin or second deliverance, if the plaintiff was nonsuit, or otherwise barred, in the same manner as the plaintiff would have recovered them. Where lands delivered in execution were evicted, a remedy by *scire facias* against the party or his executor is given by stat. 32 Henry VIII., c. 5, to have the part of the debt unsatisfied out of other lands belonging to him.

Provision was made by stat. 4 Henry VIII., c. 4, for proclamations on exigents in foreign counties, Proclamations on exigents. which act was perpetuated by stat. 6 Henry VIII., c. 4. It was thereby directed, that where in any action personal a defendant was described of one county, and an exigent was awarded into another, it should be lawful for the justices to award a writ of proclamation to the sheriff of the county of which the defendant was described; or if the king's writ runneth not there, then to the adjoining county (a). The proclamation was to

(a) It is necessary, in order to understand the subject of outlawry, to have regard to the doctrine of original writs. The formal grounds of action, and the practice as to process thereon, it was necessary should issue into the county where the cause of action arose, and where it was to be presumed, in the first instance, the defendant resided; although it was also necessary, if in point of fact he could not be found there, to issue process grounded on this original writ into the county where the party was supposed to reside. It is to be observed, that at common law it was not necessary that there should be any personal service of process, and the summons which the sheriff issued upon the original writ directed to himself might have been served at the residence of the party. Hence it might be that it was not known where the defender personally was, and he might have residence in more than one county, and be sometimes in one and sometimes in another; and hence it did not follow, that because he was not in the proper county at the time the sheriff received the original writ, that he might not be there afterwards. Therefore it was necessary that all subsequent writs should be grounded on the original writ, and issue first into the proper county; and

¹ Salk., 506.

contain the effect of the action, and to direct the sheriff to make three proclamations within his county at three

then, if necessary, further writs of *capias*, or otherwise grounded thereon, issued into any "foreign" county where the defendant might be supposed actually to be. On the other hand, if the process only went into the proper county, it might not come to the knowledge of the party, as he might be residing in another county; and as outlawry was grounded upon a supposed contempt in disregard of process, it was of its essence that there should be presumable knowledge of the process; and hence reasonable endeavors to convey notice. The scope of this statute, therefore, was to carry out the principle, and require that process of outlawry should be based upon process into the county where the defendant was supposed to be. This did not interfere with the established doctrine that all writs, like the original writ, must go first into the proper county in which that original writ had gone; and hence it was held after this statute, that the *capias* on which the writ of *exigent* lies must be into the county where the action is brought; and that if it issued upon the *testatum* writ into a foreign county, it would be erroneous (*Dyer*, 295). Under this statute it was held that if a *capias inter-gatum* went into Mid-Kent against a defendant called "late of London, *alias dictus* of Newington, in the county of Kent," and the proclamations were in Kent, when in fact he was commorant in Middlesex, he might avoid the outlawry under the above act, without writ of error. But if the action were brought in any other county than London or Middlesex, the proclamations need not have been where he was commorant. And if he was wrongly described in the writ as to his residence, he might avoid it by the statute of additions (*Dyer*, 203). In that case the *capias* was issued to the sheriff of Middlesex against one Digges, late of London, otherwise called of Newington, Kent; and a writ of proclamation was sent into Kent, and returned served; and he pleaded in discharge of the outlawry that he was commorant and conversant at the villa of St. Catherine, in the county of Middlesex, on the day that the writ of *exigent* was issued, in which county no writ of proclamation was awarded, according to the above statute; and it was thought that the plea was good, for that the "otherwise called" of Kent did not describe the residence, and therefore that the writ of proclamation ought not to have issued into Kent, as it ought to have done if he had been expressly called in the writ, "of Newington, in Kent," or "late of Newington, in Kent," for then of necessity the proclamation should be made there. And it was said that if a man was sued in Kent, and was called late of a place in Essex, and the truth was that neither at the time of issuing of the original writ, nor at the time of the *exigent* issued, was he commorant or conversant there, but in Sussex, where no writ of proclamation was awarded, but only into Essex, yet the outlawry in Kent would be good by this statute, because the proclamation issued into the county of which he was called, etc., and if the description was false, then he might avoid the outlawry by the statute of additions (1 *Hen. V.*, c. v.). But in the above case, it was said he might well avoid the outlawry, though he was called "late of" London, if he had removed his habitation into another county at the time of the *exigent* un-avoided. And so it was of original process in Middlesex, "late of Westminster," but not so of other counties (*Dyer*, 214). It is to be observed that the statute made special provisions for London and Middlesex. "And as it seems," said *Dyer*, "the cause of their privilege was because the resort of people of all parts of the realm was more to London and Middlesex than to any other place." And by reason of this they might be named in suits against them "of London or Westminster," or "late of London and Westminster," although their habitations and commorances were not there

different days, two in full county court, the third at the general sessions, requiring him to yield himself to the sheriff of the foreign county into which the exigent was awarded. Such proclamation was to have the same return as the exigent, and to be made out by the same officer. Any outlawry promulged in a foreign county, without award of such writ of proclamation, was declared void.

Several regulations were made respecting jurors, as well to secure a regular appearance of them at the trial as to guard against or to punish perjury and misbehavior (*a*). Two of these parliamentary

Jurors.

(*Ibid.*). Lord Coke in commenting upon the effect of the statute of additions (1 Hen. V., c. v.), which is *in pari materia* with the present statute, says, "That a *nuper* may be of the town, etc., because men do often remove their habitations; and this distinction," he adds, "appears by the act itself by reason of the words relating to towns, hamlets, etc., *on ils prevont on sont.*" "The end and purnen of the act," he says, "was, that the person of the defendants in originals, where process of outlawry did lie, should be so described by certain additions, as that one man might not be troubled for another;" and so he says other statutes passed to the same end, among which he mentions the above statutes, 6 Henry VIII., c. iv.; 5 Edward VI., c. xx.; and 31 Elizabeth, c. iii.; and cites Dyer, 4 Eliz., fol. 213, 214. Upon the words, "that any outlawries pronounced" (without due and proper additions), should be void, he observes that this means by plea or writ of error; and accordingly, upon the statutes of outlawry, it was held that the outlawry could not be avoided in the action by pleading to a plea of outlawry (*Draycot v. Curzon, Lutwyche*, 40).

(*a*) As by the ancient constitution of the country, in that respect still remaining unchanged, the whole administration of civil and criminal depended upon the jury system, there is no subject which has been the cause of more anxious or more careful legislation. It is probable that it is the most ancient part of our constitution, and consequently the most deeply-rooted in our earliest institutions. It has been shown in the first volume that the jury system arose out of the county court, which was as held from month to month in the hundred, the only court provided by our ancient Saxon constitution for ordinary and original jurisdiction in civil cases; and as held half yearly in the tourn of the sheriff, was the ancient court of criminal jurisdiction. In these courts the freeholders were the judges, but their assemblies were tumultuous, and had little resemblance to judicial tribunals. It has been shown that by appointing king's justices to hold the courts, and by their directing a specific number of the freeholders of the vill or hundred, where the matter arose, to be jurors to try the cases, these tumultuous assemblies were converted into something like courts, which in this respect they continued unchanged, though the substance or basis remained the same, that is, they consisted of the *freeholders* (since, in ancient times, all freemen were freeholders, and all who held land at all held the freehold), and, moreover, the old principle that the jurors must be local and come from the place where the matter arose—*i. e.*, the vill or hundred—was still retained and adhered to. In course of time, however, as, on the one hand, leases had become so common and much of the property in possession was leasehold; and, on the other hand, copyhold estates had become recognized and established by law, and as a man who had a leasehold or copyhold estate might be in

provisions were confined to jurors in London. In the former reign,¹ it had been endeavored to enforce appearance by larger issues: there being some doubt how these were to be levied, it was now directed,² that the mayor might distrain for them. This was confined to actions in the city courts. By the last it was ordained, to prevent delays for want of jurors, that in all city actions depending in the courts at Westminster, the sheriffs might summon persons having goods to the value of one hundred marks, as well as those having lands or tenements of forty shillings value annually. It further directs, what issues should be returned on the first and second distress, and all the subsequent ones.³

A more general provision was made by stat. 35 Henry VIII., c. 6, to effect a due appearance of jurors at *nisi prius*. It was ordained (*a*), that where the jurors, upon an issue joined, in a court at Westminster, were to have forty shillings freehold, the *venire facias* should specify *quorum*

fact far more wealthy and valuable as a juror than a freeholder, it is manifest that an occasion had arisen for some change in the law, although it is probable that the necessity for a change was first and far more strongly felt in London and Westminster, where the number of causes was greater and the number of freeholders less than in the country towns and cities. The old qualification for jurors, as for county electors, it should be stated, was the same, viz., a forty shilling freehold. Whether the jury qualification had arisen by custom, and the franchise qualification (established by the stat. of Henry VI.) had followed it, or whether the jury qualification had followed the franchise qualification, is not material; the important point is, that both qualifications, it was deemed, should be substantial, for at the time these qualifications were established, forty shillings represented what would be equal to £50 in our time. The stat. 4 Henry VIII., c. iii., concerning juries in London, recited that delay often arose from lack of jurors having lands and tenements of the yearly value of forty shillings, and provided a qualification in personalty; and the 35 Henry VIII. made further provision.

(*a*) This act recited that the issues joined in every action between party and party at the common law are triable, for the most part, by verdict of twelve men, wherein is daily seen great delay, partly for lack of appearance of the persons returned to try such issues, the occasion whereof cometh by reason of maintenance, embracery, sinister labors, and corrupt demeanors, and partly by reason of challenges to the jurors. And then it enacted where each juror must by law have forty shillings yearly from freehold, only such jurors should be returned as had a freehold estate to that amount, and that even where it was not strictly necessary in law that the jurors should have estates to that amount, none should be returned who had not *some* freehold within the county; and in every case there should be six sufficient hundredors, if there were so many in the vill, from the vill or hundred where the seisin lay, i. e., where the matter arose or occurred.

¹ *Vide* c. xxvii.

² Stat. 4 Hen. VIII., c. 3.

³ *Vide* also stat. 5 Hen. VIII., c. 5.

quilibet habeat quadraginta solidatas terræ, tenementi, vel redditus ad minus; and the sheriff was not to return persons who were not so qualified. In cases which did require that clause, he was not to return any that had not some freehold; and in both cases, he was to return six hundredors, at least, if there were so many within the hundred (a). Upon every first *habeas corpora*, or *distringas*, with a *nisi prius*, the sheriff was to return at least five shillings; at the second, ten shillings; at the third, thirteen shillings and fourpence; and upon every subsequent one he was to double the issues, till a full jury was sworn, or the process otherwise determined. If a full jury should not appear, or after challenges there was likely to be a default of jurors, the justice, at request of the plaintiff or defendant, might command the sheriff to name and appoint as many persons of the same county, then present at the assizes or *nisi prius*, as would make up a full jury, who should be added to the panel, and their names annexed to it: these were to be liable to challenge, as if they had been empanelled on the *venire facias*; and if they made default, they might be fined as jurors at common law. The jurors first empanelled were nevertheless to lose their issues, the same as if the jury had remained for default of jurors, unless they were excused upon any reasonable cause by the justice; in like manner, if the jury was not taken by reason of the not coming of the justices. The subsidiary jurors added according to the directions of this act constituted what were called *tales de circumstantibus*, and they were mentioned under that appellation in stat. 37 Henry VIII., c. 22, made for continuing this act, which was only temporary.

Now we are upon the subject of jurors, we may introduce a statute made for altering the proceedings in attaint. We have observed, in the last

Attaint.

(a) At common law, there ought to be four hundredors on every trial. The stat. 35 Hen. VIII. required six hundredors on a plea of land between common persons. By the stat. 27 Elizabeth, c. vi., two hundredors were to be sufficient in personal actions; and by 4 and 5 Anne, c. xvi., the whole jury in trials at Westminster might be *de corpore comitatus*. On an information, which was at common law, it was necessary only to have four hundredors (*Jenkins' Centuries*, 201). The 27 Elizabeth raised the jury qualification of freehold to £4, and subsequent statutes provided other qualifications, the whole law on the subject being consolidated by the jury act of George IV. (6 Geo. IV., c. 1), which established a £10 leasehold qualification.

reign, that the parliament had provided a new way of punishing jurors, and had foregone the ancient villainous judgment in attain^t.¹ That statute was only experimental; and therefore, after being continued by one at the beginning of this reign, was suffered to expire in the third year of this king's (a).² Attaints, therefore, again

(a) This ancient mode of redress, or rather of punishment, for an untrue verdict, was found practically ineffective, belonging, as it did, rather to an earlier age, when juries found of their own knowledge, so that, if a verdict was false, it would be false to their own knowledge, and wilfully false. Hence procedure by attain^t, which was for punishment. But where juries found (as now was the practice) upon evidence, it is obvious that many verdicts might be false which were not wilfully false; and, moreover, what was wanted in such cases was not punishment, but redress. This was afforded by an adaptation, by the practice of the courts, of the procedure established by the common law. The difficulty, it is to be observed, was not as to the law upon an admitted state of facts, for as to that the common law and the practice of the courts afforded abundant remedy by special pleading or by special verdict, and ultimately by special case. It has been seen that juries were liable to attain^t, even if their verdict was wrong in law, because it was considered they ought either to follow the direction of the judge, or return a special verdict, on which there was no attain^t. Where the question was a mixed question of law and fact, on which the jury might have difficulty in applying the law to the fact, a party could, supposing the facts not to be in dispute, set them forth specially in his pleading, because of the doubt of the laymen — the jury "per doubt del lay gens;" and then the other party, by demurrer, could refer the question of law to the court (*Year-Book*, 8 *Hen. IV.*, fol. 6; 2 *Hen. VIII.*, fol. 2; *Pain v. Rochester*, *Cro. Eliz.*, 871; *Chambers v. Taylor*, *Cro. Eliz.*, 900; *Cox v. Worcall*, *Cro. Jac.*, 193); or, if this course were not taken, and upon the trial it appeared that there was no dispute as to the facts, then upon the evidence given on one side, the other party might demur, and so again refer the matter of law to the court. Or, again, on the whole evidence, whether on one side or both, the jury might return a special verdict, and thus refer the law to the court. Upon the demurrer to the evidence, the case was argued as to its legal effect, as in a case in this reign where certain evidence was given for the defendant (to excuse his act), and upon this evidence the plaintiff demurred; and it was argued in the court above, and it was said, that where a man pleaded the general issue, and gave special matter in evidence, that evidence was not good, and would not maintain the issue; and if the plaintiff demurred upon the evidence, it was peremptory to the defendant. As in debt or trespass, if defendant pleaded the general issue, and then gave in evidence a release, that evidence would not discharge the action (12 *Hen. VIII.*, fol. 1). Therefore, in that case it was held that the defendant could not take advantage of the evidence, and judgment was given for the plaintiff (*Ibid.*, fol. 2). Now this, it will be manifest, was upon a point of law; and so it would be in all cases of demurrer to evidence; it would only withdraw the case from the jury on a point of law. In all pleas, as well of the crown as of common pleas; in all actions, real, personal, and mixed, and on all issues joined, either between the king and the party, or between party and party, the jury may find the special matter which is pertinent, and tends only to the issue joined, upon which being doubtful to them in law, they may pray the

¹ *Vide c. xxvii.*

² Stat. 1 *Hen. VIII.*, c. 24.

returned to their ancient course, till stat. 23 Henry VIII., c. 3, which renewed the policy of the act of the last reign

opinion of the court; and this they may do by the canon law, which has ordained that matters in fact shall be tried by the jurors, and matters in law by the judges; and as, *ad questionem facti non respondent iudices, ita ad questionem juris non respondent jurata*; but their duty is to find *veritatem facti*, and leave the discussion of the law to the justices (*Douman's Case*, 9 *Coke*, 13). But then a special verdict only set forth facts as proved and found by the jury; and upon these facts no inference could be drawn by the court. And the question was often as to the inference of fact proper to be drawn from facts actually proved. And, again, the jury might err, either on a special or general issue, as to the *credibility* or *effect* of the evidence adduced. The bill of exceptions was rather a mode of withdrawing the case from the judge than from the jury; for, though the exception could only be dealt with by the judge, and generally would have the effect of withdrawing the case from the jury, if allowed, the bill of exceptions, in the event of its being disallowed, was to withdraw it from the judge for the court above; and though the exceptions might be that, upon the whole of the evidence on one side, there was no case on which the jury could legally find a verdict in favor of the party offering the evidence, that was rather an exception in point of law, that the jury ought not to be allowed to determine on the case at all, than a mode of reversing or redressing a wrong verdict on a case within their province. Thus, in the course of this reign, in action on simple contract, which was decided at the time at *nisi prius*, the plaintiff gave in evidence that the defendant came to the wife of the plaintiff, he being absent, and promised to her that if her husband, the plaintiff, would do so and so, he, the defendant, would pay, etc.; and that the plaintiff agreed to this, and did the act contracted for. And the defendant said that this evidence was not good; for that the wife could not be a party to such a promise without some previous authority; and it appeared to the justices at *nisi prius* that the exception was not good; upon which the defendant made a bill of exceptions, and one of them sealed it, and the verdict passed for the plaintiff; and thereupon afterwards the defendant moved *in banc* to arrest the judgment (a proceeding in these days had upon evidence, as well as on matter upon the record), and the case was argued. It was urged that the defendant could not have advantage of the objection on the arrest of judgment, as it was in a bill of exceptions, which ought to go into a court of error; but in the result the court held the evidence *sufficient* to sustain the action, and the plaintiff had judgment (27 *Hen. VIII.*, fol. 25). The objection, it will be observed, was one of law, as implied in the exception itself, and its effect was not one for the jury at all. So in a special verdict the case was submitted to the court on real or supposed findings of the jury, to determine their legal effect. So the only other procedure provided by the course of the common law, which went to withdraw the case from the jury is that of demurrer to the evidence, rather referred to the court only its legal effect than its effect in point of fact, since all inferences which upon the evidence could possibly be drawn for the party who offered it were supposed to be drawn, and the court thus determined upon the evidence with all possible inference from it in his favor, that is, all inferences which the jury might have drawn, though not bound to draw them. To that extent certainly the case was in a sense withdrawn from the jury; but, it will be seen, to a very limited extent; for if the party demurring disputed any possible inference in favor of the other party, he was bound to leave the case to the jury. The practice of the courts, however, at a very early period of our legal history, appears to have established a more convenient course for withdrawing the case from the jury, even on the facts so far

in the following manner: In every case of an untrue verdict, between party and party, in any suit, plaint, or

as regarded the proper inferences of facts from facts admitted, or given in evidence and not disputed. This was by reservation of the case upon the evidence. At a very early period, and all through the Year-Books, instances will be found of a practice of reserving a case for the court *in banc*, or stating it to the court upon the evidence given at the trial in order to take their view of its effect. This, however, was originally, and for a long period, entirely on matter of law; the advantages of this course being that it was less formal than special verdict or demurrer to evidence, and the disadvantage being that as the evidence was not set out on the record, the case could not be carried into error. In course of time, indeed, the practice was of advantage to the court drawing inferences of fact, but that was much more modern, and even when it arose was far from withdrawing the case from the jury upon disputed facts; in which case alone a false verdict could be given, though a wrong or erroneous verdict perhaps would most often arise from error as to the proper inferences of fact, or mistake in the application of the law on a mixed proposition of law and fact. In such cases the reservation of the case for the court above would afford a convenient remedy. But for a false or wrong verdict in disputed questions of fact, none of those courses of proceeding would afford any remedy; and the procedure of attain, though it avoided the verdict, was penal in its character, and did not afford a single remedy by setting aside the verdict, and granting a new trial. That remedy was ultimately provided by the practice of the courts, grounded on the equity or spirit of the statute as to bill of exceptions, and an extension of the practice as to the procedure by attain. In the latter the verdict was allowed, in the other there was a *venire de novo*. The bill of exchequer, however, proceeded rather upon error in law, though that might be in not withdrawing a case from the jury, or not directing a verdict one way or the other. The peculiar scope of attain was a false verdict on the facts. The proper and peculiar province of the jury was always recognized to be disputed matters of fact, either on the credibility of witnesses or on contradictory testimony. And wherever this was the case, either party could insist upon the case going to the jury (*Cro. Eliz.*, 752); and neither by demurrer to evidence by bill of exceptions or by special verdict could be taken from them, that is, when there was evidence fit for them to consider. And if there were a doubt whether a matter of fact was well proved, the other party could not demur to the evidence, for the jury might find it on their own knowledge (*Co. Litt.*, 72; *Alyn*, 18; 1 *Levinge*, 87). There were great practical difficulties in the trial of an attain. In the 34 of Henry VIII. attain was brought upon a verdict given against the plaintiff in a writ of entry, on a disseisin brought against the defendant by the plaintiff, and for evidence a will was shown without probate, and without any subscription or seal. And to prove the will were three witnesses; but two deposed upon the report of others, and the third deposed of his own knowledge, and his name was in the will as a witness; but the land had been in other hands against the will for twenty years or more. And notwithstanding all these proofs the jury gave a privy verdict against the plaintiff and the will, by which means the plaintiff was nonsuited. And it was agreed for law that a will of lands at that time might be well enough proved by witnesses without writing or probate, wherefore probate was not necessary; but the jury paid little regard to the testimony. And it was held for law that the plaintiff in attain could not give more in evidence than he had given to the petit jury; but, on the other hand, the defendant might give more affirmation of the first verdict. And upon this point there was much contention, whether the plaintiff gave more evidence than at the first trial? and

demand, before judges of record, where the thing in demand was worth forty pounds, and did not concern a

therefore it was said by the court that it would be wisely done to have the evidence written, but because it was not, the court examined all the witnesses upon oath, whether they gave the same evidence as at first or not. And the judge, in recapitulating the case, admonished the jury to look to the evidence which was given to the first jury; for he affirmed it to be the law, that if they had pregnant and manifest evidence to confirm the matter, although it were in fact false, and the truth of the matter was contrary to it, still they ought not to regard it, but ought to weigh in their minds what they themselves would have done upon the same strong evidence, as the first jury did (*Rolfe v. Hampden*, 34 *Hen. VIII.*, *Dyer's Reps.*, 53). When an attaint was brought upon a verdict given contrary to the opinion or direction of the court, though the attaint was not a strict law or *supersedes* of the first judgment, they would stay execution until the attaint might be prosecuted (*Dyer*, 81). But the proceeding was extremely unsatisfactory from its feudal character, and thus when, after a protracted trial, the plaintiff had a verdict that the first verdict was false, the court were evidently reluctant to pronounce a judgment, and it hung up term after term (*Ayliffe v. Platt*, *Dyer*, 81). A special case was often raised. Thus in the Year-Book, Henry VIII., a case was spoken of among the justices, "stating it, and then the judges differing, afterwards the case was shown to Fitzherbert," and judgment was given upon it (*Year-Book*, 27 *Hen. VIII.*, fol. 30). Starkey, recorder of London, came to the bar, and desired to be advised by the justices if an action of account would lie, etc. (1 *Edw. V.*, fol. 2), and the case was discussed and decided. So all through Lord Coke's reports, instances can be found in which the case was stated to the court "upon the evidence"—that is, the court in which the action was tried (4 *Co.*, 23, 27). But then that was at a time when the courts in London tried all cases "at bar"—that is, before all the judges of the court—and so they could, by merely adjourning the consideration of the case, practically "reserve" a case. That, however, was rather on facts proved or ascertained, and the rule of law always was and is, that upon facts *ascertained*, the application of the law is for the court (*Yelv.*, 10). The difficulty, however, was when the facts were in dispute, and the verdict was contested on the facts, *i. e.*, the verdict was said to be false. It is to be observed, however, that the remedy by new trial given by the practice of the courts, was only available where the common law did not provide that remedy by bill of exceptions, and *venire de novo*. For it was not allowable after a trial at bar, *i. e.*, before all the judges of the court, even although the jury found against the evidence (*Fenwick v. Grosvenor*, 2 *Salk.*, 650; *Argent v. Darrell*, 1 *Lord Raym.*, 514; *Salk.*, 48); and, on the other hand, bill of exceptions will lie on a trial at bar; the words of the statute being that the justices shall sign it (*Thoreston v. Slatford*, 3 *Salk.*, 155). A new trial was granted on an affidavit that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced (*Dent v. Hundred of Hertford*, 2 *Salk.*, 64). It appears that so long ago as the time of the commonwealth, and perhaps earlier, the practice of granting new trials had arisen in cases where there was reason to believe the verdicts were wrong upon the facts in dispute, so that there would be no other remedy. There can be no doubt that the law as to attaint led to the practice of special verdicts, or caused it to become much more common than it otherwise would have been. For juries were liable to attaint even for error of law, on any issue in which a matter of law was mixed up with matter of fact, which was the case with most issues. Legally, it would be hard to acquit a jury that found against the law, either common law, or general statute, "whereof all men were

man's life, the party grieved might have an attaint against the jurors and the party; with summons, resummons, and

bound to take knowledge, even though no man informed them of it" (*Hobart's Reps.*, 227; *Vaughan*, 150). It may be doubted whether this last could be good law, *i. e.*, where the judge did not direct the jury upon the law; but at all events, it is obvious that the liability to the prosecution would render juries careful to find according to the direction of the judge on matters of law, and ready to find special verdicts where he was too much in doubt to direct them; and accordingly, after this statute, special verdicts became extremely common, insomuch that the great majority of cases reported were determined thereon from the present reign up to the time of Holt, when special cases appeared in the reports; though there is reason to believe they had come into practice much earlier, in cases where it was not desired to carry a case into a court of error. The procedure by attaint lay not only if the verdict was false in fact, but even if it were false in law, though true in fact; and this led to the practice of special verdicts or reservation of cases (*vide ante*). If there be any matter of law that carries with it any difficulty, the jury may, to deliver themselves from the danger of attaint, find it specially, that so it may be decided in that court where the verdict is returnable, and if the judge overrule the point of law contrary to the law, whereby the jury are persuaded to find a general verdict (which yet they are not bound to do, if they doubt it), then the judge, upon the request of the party desiring it, is bound by law, in convenient time, to seal a bill of exceptions containing the whole matter excepted to, so that the party grieved by such indiscretion or error of the judge may have relief by the writ of error on the statute of Westminster (*Hale's Hist. Com. Law*). Either party might always insist upon the matter of first going to the jury, subject to a bill of exceptions, if there was not sufficient to sustain the issue, or if any evidence was not admissible or relevant to sustain the issue. But the difficulty to be dealt with was where there was admissible evidence, which, if credible, would, in the event of the jury drawing certain inferences from it, be sufficient to sustain the issue. In such cases the credibility and the weight of the evidence would be for the jury. And they might err (assuming it credible) in drawing the proper inferences therefrom, that is, they might draw the wrong inferences, or fail to draw the right inferences. To remedy this evil, the courts afterwards granted a new trial, on the ground of the verdict being against the weight of the evidence (see the judgment of Lord Mansfield in *Bright v. Crisp*, 1 *Burrowes*, 391). Thus attaints were superseded. The difficulty, therefore, as to the fact could not be avoided by special verdict or demurrer to the evidence. Thus, says a great author, "There is a great difference between evidence offered to the jury, and offered to the court, on a special verdict, for the jury are the only judges of the fact, and are to make the deductions and conclusions as to the truths of the fact from the evidence as it lies before them; but the court cannot make any deductions or conclusions as to the truth of the fact, unless they flow necessarily and demonstratively from the evidence, for they are not judges of probable or improbable, but of lawful and not lawful" (*Gilbert on Evidence*, 185). Hence it follows that the decisions of the juries in the same case on different trials may well differ, for a very small difference in the evidence may make all the difference as to its weight and effect, and hence the court will never reverse a verdict merely because the judge would have found otherwise on the facts; but either because there was no evidence to sustain the verdict, which is always matter of law, and shows that there was either misconduct or error in law, or because the weight of the evidence on one side greatly outweighs the other.

distress infinite against them, and also the grand jury. Every one of the grand jury was to have freehold of the yearly value of forty shillings. The distress against the grand jurors was to be awarded, and open proclamation was to be made, and this was to be fifteen days before the return of the distress. If the party or any of the petit jurors made default, the grand jury was to be taken against every one so making default. Those who appeared, were to have no answer to the plaintiff, except *that they made true serement* (provided they were the same persons, and the writ, process, return, and assignment were good and lawful), and the party was to plead that *they gave a true verdict*; and if they pleaded in bar, the grand jury was still to go on to inquire whether the first jury gave a true verdict. If the jury were convicted, each of them was to forfeit twenty pounds, half to the king, and half to the party grieved; they were also to be fined at the discretion of the justices, and their oath never more accepted in any court: the party's plea being also found against him, the plaintiff was to be restored to what he had lost, with reasonable costs and damages. It was ordained, that outlawry or excommunication of the plaintiff should be a void plea, not to be answered. In process of attaint, day was to be given as in a writ of dower, and no essoin or protection to be allowed. An attaint was not to abate for the death of the party, or any of the jury.

If the verdict was for a personal thing, as debt, trespass, or the like, under forty pounds, there was to be the same process and pleas, and delays were in the same manner to be removed: only the qualifications of the grand jury need not exceed five marks yearly of freehold, or the property of one hundred marks of goods and chattels; and the petit jurors, if attainted, were to forfeit only five pounds, and also make fine and ransom.

In either case, if there were not sufficient qualified jurors, a *tales* might be awarded into the next county. The remedy of this statute was also extended to persons grieved by any untrue verdict of inheritance in descent, or of freehold or inheritance in reversion or remainder. If the plaintiff was nonsuit, or discontinued, he was to make fine by the discretion of the justices. All attaints were thenceforward to be taken in the king's bench or common pleas, and in no other court; and *nisi prius* might

be granted by the justices upon the distress; every petit juror might appear by attorney.

There is a proviso declaring that this statute shall not prejudice the act of the last reign¹ respecting attaints in the city; but that attaints might be either brought there in the hustings, or under this act. To obviate some infringement which it was apprehended the city privileges might undergo by the general form of this act, it was in a subsequent statute declared,² that in attaints for verdicts given by citizens, the jurors need no qualification of freehold, but only to have four hundred marks in value of goods and chattels; and, further, that the justices should sit at Guildhall, or elsewhere in the city, to try such attaints.³

Such was the new form into which this ancient proceeding for punishing the perjury of jurors was now thrown: it has been treated very fully in the early parts of our history; and when it underwent so important a revolution, it seemed proper that such changes should be recounted equally at large.

The attainting of substantial justice was promoted by a new statute of amendment and jeofail: this Statute of jeofail. was stat. 32 Henry VIII., c. 30, which took away some of the minute causes of exception to which records and proceedings were before liable (a). It ordains that after verdict judgment shall be given, notwithstanding any misleading, lack of color, insufficient pleading, or jeofail, any miscontinuance, discontinuance, or misconveying of process, misjoining of the issue, lack of warrant of attorney of him against whom the verdict is, or any other default, or negligence of any of the parties, their counsellors, or attorneys; nor shall any writ of error, or of false judgment, be maintainable on account of any of the defects above mentioned. By the same statute, attorneys are required to deliver their warrants of attorney

(a) This statute was practically made nugatory by a narrow-minded decision that it did not apply to declarations, but only to subsequent pleadings. Hence the necessity for another statute in the reign of Elizabeth.

¹ Stat. 11 Hen. VII., c. 21. *Vide ante*, c. xxvii.

² Stat. 37 Hen. VIII., c. 5.

³ It appears from the preamble of this statute, that the city privilege about trials run thus: That inquisitions of the citizens of London should be taken at St. Martin's-le-Grand, or at the Guildhall of the city of London, and not elsewhere, except inquisitions before the justices in eyre, at the Tower of London, and for the delivery of the gaol of Newgate.

to be entered of record, the same term the issue is entered, under penalty of £10, and imprisonment at the discretion of the court. After this act, much room was still left for the parliament to interpose on the same subject, as has been since done by many statutes of greater extent than the present.

While these provisions were made to prevent the failure of actions on account of trifling defects in the proceedings, the ancient strictness was still preserved in criminal prosecutions: in these it was thought not inconvenient to allow any exception which could, upon any fair pretence, be taken in favor of the life or liberty of a defendant, after conviction. But the stat. 37 Henry VIII., c. 8, ordained that, for the future, the words *vi et armis, videlicet, cum baculis, cultellis, arcubus, et sagittis*, or any of the same or like words, if omitted in an indictment or inquisition, shall not be a cause to avoid such indictment or inquisition, by writ of error, plea, or otherwise. A doubt has been raised on the construction of this statute, whether it was meant to extend to all the words there recited, or only to those which come under the *videlicet*. This has prevented the full benefit that otherwise might have been derived from this only statute of jeofail which relates to criminal proceedings.

As the end of all laws is the quiet and peace of society, the limiting a period of time within which persons must pursue their remedy by action, was a wise and politic constitution. Some statutes were made for the limitation of actions.¹ The cruel proceedings upon penal statutes in the last reign, made it necessary to fix some bounds to common informers. By stat. 1 Henry VIII., c. 4, actions on penal statutes were to be brought by the king within three years, and by any common person within one. This act being temporary, was continued by stat. 7 Henry VIII., c. 3.

A more general provision was made for limitations in several real writs by stat. 32 Henry VIII., c. 2, Statute of limitation. which states in the preamble two inconveniences from the present *length of limitation*: one is, that it was above the remembrance of any man to try and know the certainty of the point in issue; and that persons, though

¹ Vide vol. ii., c. ix.

they and their ancestors had been in long possession, could not enjoy their estates in safety. To remedy this, the following alterations were made (a): That no person

(a) The principle of this statute had already been established in the statute of non-claim (4 *Hen. VII.*, c. xxiv.). It will be observed that it only applied to real actions, that is, actions for recovery of freehold estates, in which the right of action was based on the *seisin* of an ancestor of the plaintiff, or of the plaintiff, and, therefore, it was framed upon the principle of allowing a longer time to preserve a right which had belonged to an ancestor than one which had accrued to the claimant himself. For if he had been seized himself he must have *known* of his right, and his *laches* would be useful; whereas, if he had never been seized himself, he might not know of his right; and although it was necessary to bar it after a certain time, that time might reasonably be much larger than in the other case. It is to be observed again, that the right to be preserved, in the cases where it was *not* based on *seisin* of the claimant, but of some ancestor, would not be a right of *entry* as a descent cast "tolled," or took away a right of entry, and so an ejectment could *not* be brought. Further, it will be observed that this statute contained no limitation of rights of entry or actions of ejectment, because not at this time used for recovery of the *freehold*, but only the remedy of *termors*. In the course of the ensuing reigns the action of ejectment became so applied, and then a new kind of limitation was required. The statute, 21 James I., c. xvi., enacted, that no person should *make any entry into lands, tenements, or hereditaments*, but within twenty years after his right should have first descended or accrued to him. This indirectly took away the right of action in *ejectment*, because it proceeded upon a supposed right of entry; and if the right of entry was gone, the right of action was gone. It left *real actions not founded on right of entry*, but on the *right of property*, as they were limited under the above act, and as a right of action in a real action was generally founded on an ancestral right which accrued a long time back, therefore required a longer period of limitation; for the same reason it might be barred, and yet a new right of action in ejectment might have arisen within the twenty years before action was brought. It is to be observed, that, under the above statute, though a man had been out of possession of land for sixty years, yet, if his entry was not tolled or taken away, he might well enter and bring any action on his own possession, for the first clause did not bar any right, but prohibited that no person should sue on the possession of his *ancestor* except within sixty years. But if his entry was "congeable," and he entered, he might *have an action* on his own possession (*i. e.*, ejectment or assize of novel disseisin); and the first and second clauses extended only to *seisin* ancestral, and not to a writ of right brought of his own *seisin*. And the third branch extended only to actions of his own possession and not to entries; and the last to *formedons* and certain real actions (*Bevill's Case*, 4 *Coke's Rep.*, 13). Hence the necessity for another statute of limitations, which was accordingly passed in the next reign. Under this statute of James, no statute said in terms that an action of ejectment should not lie after twenty years' possession; but the statute 21 James I., c. xvi., said that no one did have a *right of entry* after that period of possession; and ejectment, being founded on a right of entry, could not be maintained where the right of entry was taken away (*Yard v. Ford*, 2 *Williams, Saunders*, 174). Thus twenty years' possession under the statute of James was like a descent which tolled or took away a right of *entry* and gave a right of *possession*, which was sufficient not only to defend but maintain an ejectment (*Stokes v. Berry*, 1 *Sulk.*, 338). And there might be a right

should sue a writ of right, or *make prescription, title, or claim*, alleging the seisin of his ancestor, any otherwise than within threescore years before the *teste* of the writ, or before the prescription, title, or claim made: That no person should maintain an assize of mortancestor, cosinage, aiel, writ of entry upon disseisin done to an ancestor, or any other action possessory of any further seisin of himself or his ancestor, but within fifty years before the *teste* of the writ; nor of his own seisin, above thirty years before the *teste* of the writ; nor should avow or make cognizance for any writ, suit, or service, alleging a seisin thereof in himself, his ancestor, or any one whose estate he had, above fifty years next before the making of the avowry or cognizance. All formedons in reverter and remainder, and every *scire facias* on a fine, was to be sued,

of entry quite distinct from the right of property, which would support a real action (*Hunter v. Brown*, 1 *Salk.*, 339); and there might be a new right of entry apart from the ancestral right barred by this statute (*Ibid.*). Under the statute of James it was indeed only the action of ejectment which was barred, and other actions, the old real actions, remained limited as by the above statute of Henry VIII. Twenty years' possession barred the action of ejectment by the party entitled as of right (*Fisher v. Taylor*, *Comp.*, 219), and put him to his real action. On the other hand, twenty years' possession gave the right to bring the action of ejectment against any one who had been in possession for a less number of years (*Dean v. Burnard*, *Comp.*, 597). "The title, it was said, is a possession of twenty years. If no other title appear, a clear possession of twenty years is evidence of a fee-simple" (per Lord Mansfield, *C. J.*, *ibid.*). Even on a writ of right it was held that proof of possession of land and permanency of the profits was *prima facie* proof of a seisin in fee, and that though this was sufficient to found a writ of right by the heir-at-law any time within sixty years, yet more than twenty years' subsequent possession as the tenant raised a counter presumption that the fee was in him (*Jayne v. Price*, 8 *Taunt.*, 326). And though it was urged that this would put an end to the remedy by writ of right in every case, after twenty years' possession (which it certainly would, and did) the court said, "It would make writs of right the most mischievous proceeding in the world, if because a simple possession was shown more than twenty years ago, thirty years' subsequent possession should not prevail" (*Ibid.*). Accordingly, writs of right being, when they were brought, discouraged, gradually fell out of use, and a twenty years' limitation practically prevailed. Until the 3 and 4 William IV., c. xxvii., which abolished real actions, the writ of right, and the period of limitations adapted to it, remained as under the 32 Henry VIII. That action was one in which the right of property to the land was alone put in issue, without regard to the right of possession, and the party in possession might have come unlawfully to it, and yet have a good right of property, and *vice versa* (*Williams v. Gwynne*, 2 *Williams, Saunders*, 45 b). The two rights of action, therefore, were perfectly distinct, and a man might be barred of his real action under the statute of Henry VIII., and yet have a right of action in ejectment based upon a right of entry, not barred under the statute of James I. (*Ward v. Hunt*, 1 *Salk.*).

used, and taken, *within fifty years after the title and cause of action accrued*; and if a writ was brought, prescription, title, claim, avowry, or cognizance, was made any otherwise, and was traversed, and found against the person so doing, he was to be barred forever.

Among the provisions relating to the administration of justice, we must not forget one for bringing ^{Trinity term altered.} Trinity term more forward in the year. This was stat. 32 Henry VIII., c. 21, which states two reasons for such a change: first, that in this season there had often happened the plague and other sicknesses; secondly, that it was a great impediment to poor people, who ought to be employed about their harvest. It was therefore thought proper to take off the last two returns, and, instead, to add one to the beginning of the term.¹ For this purpose it was enacted, that this term should have only four common returns; the first of which was to be *in crastino Sanctæ Trinitatis*; the second, *in octabis Sanctæ Trinitatis*; the third, *in quindenâ Sanctæ Trinitatis*; but the fourth was to be *a diē Sanctæ Trinitatis in tres septimanas*, which was to take its commencement from Trinity Sunday into three weeks next following, and was to have its return with the fourth day next following, as was usual in the other returns; and the returns *in crastino Sancti Johannis Baptistæ*, *in octabis Sancti Johannis Baptistæ*, and *in quindenâ Sancti Johannis Baptistæ*, were thenceforward to be abolished. It was ordained that this term should begin the Monday next after Trinity Sunday, for the keeping of essoins, proffers, returns, and the other usual ceremonies; and that the full term should commence on Friday next after *Corpus Christi* day. When this alteration was made, another was also necessary for adjusting the relation the term, after this modification, was to bear with the others. In the old scale, settled by the stat. *Dies communes in Banco*, all writs issued in Hilary term, and those of no other, were returnable on some of the returns in Trinity term; and all those issued in Trinity fell upon some return in Michaelmas: this relation was still preserved, but it was ordered in this way. If any writ, in a real action, was returnable *in octabis Hilarii*, then day was to be given *in crastino Sanctæ Trini-*

¹ See the Diagram exhibiting the returns as they were last adjusted by the stat. *Dies communes in Banco*, 52 Henry III., ante vol. ii., c. viii.

tatis ; if in *quindenâ Sancti Hilarii*, in *octabis Sanctæ Trinitatis* ; if in *crastino Purificationis Beatæ Mariæ*, in *quindenâ Sanctæ Trinitatis* ; if in *octabis Purificationis Beatæ Mariæ*, then a *die Trinitatis in tres septimanas*. Again, if in *crastino Sanctæ Trinitatis*, in *crastino Animarum* ; if in *octabis Sanctæ Trinitatis*, in *crastino Sancti Martini* ; if in *quindenâ Sanctæ Trinitatis*, in *octabis Sancti Martini* ; if a *die Trinitatis in tres septimanas*, then in *quindenâ Sancti Martini*.

Provision was likewise made, as in the reign of Henry III., to adapt this alteration to the return of writs of dower. If a writ of dower was returnable in *quindenâ Paschæ*, day was to be given in *crastino Sanctæ Trinitatis* ; if a *die Paschæ in tres septimanas*, in *octabis Sanctæ Trinitatis* ; if a *die Paschæ in unum mensem*, in *quindenâ Sanctæ Trinitatis* ; if a *die Paschæ in quinq ; septimanas*, or in *crastino Ascensionis*, then a *die Sanctæ Trinitatis in tres septimanas*. Again, if in *crastino Sanctæ Trinitatis*, then in *octabis Sancti Michaelis* ; if in *octabis Sanctæ Trinitatis*, in *quindenâ Sancti Michaelis* ; if in *quindenâ Sanctæ Trinitatis*, a *die Sancti Michaelis in tres septimanas* ; if a *die Sanctæ Trinitatis in tres septimanas*, then a *die Sancti Michaelis in unum mensem*, or otherwise, says the act, as it is appointed by the statute of Marlbridge. Thus far of real writs. It was ordained, further, that all common writs and processes, as well personal as mixed, returnable in Trinity term, should be returnable on some of the four returns directed by this act. The justices, however, in such and the like cases and processes, where special days had been used to be appointed for the return of writs and processes, were authorized to continue to appoint special days as it seemed convenient to them. The days appointed to be given in *quare impedit* by the statute of Marlbridge, and in attain by stat. 5 Edward III., c. 7, as far as they were not contrary to this act.

CHAPTER XXIX.

HENRY VIII.

MANY NEW TREASONS CREATED — TREASON BY WRITING OR SPEAKING — TO DISOBEY THE KING'S PROCLAMATIONS — STATUTE OF THE SIX ARTICLES — PUNISHMENT OF POISONING — OF LARCENY — SERVANTS EMBEZZLING GOODS — LARCENY IN A HOUSE — LAW AGAINST GYPSIES — CHEATING BY FALSE TOKENS — GAMING — TRIAL OF TREASON COMMITTED IN WALES — AND COMMITTED OUT OF THE REALM — TRIAL OF PIRACY — TRIAL OF BLOODSHED IN THE PALACE — THE BENEFIT OF CLERGY TAKEN AWAY — THE QUESTION OF CLERGY DEBATED BEFORE THE COUNCIL — THE KING'S DETERMINATION — ABJURATION AND SANCTUARY — CLERGY AGAIN TAKEN FROM CERTAIN OFFENDERS — SANCTUARY TAKEN FROM CERTAIN OFFENDERS.

THE law of crimes and punishments began to assume a very different appearance. An alteration in circumstances, and an alteration in sentiments, induced the parliament to give a keener edge to the law, in many cases (a). To suffer such offences as murder and robbery,

(a) There can be no doubt that this was so, and in a great degree from causes which had been at work in the present reign, and which continued still to operate, and the result was to tend greatly to accelerate those changes in the law as to the powers of the church and the *status* and privileges of the clergy, which chiefly characterize this reign. It has already been more than once observed in the course of these notes, that important changes in our law have often arisen, more or less, from causes apparently very remote and indirect, and which at first sight could not be considered to have had any such results. It could not at first be supposed that there was any connection between the system of villenage and the change in the criminal law, still less that there was any connection between the latter of these subjects and the religious changes which so signalized the reign, but yet the connection will be obvious when explained. There can be no doubt that the legislation of this period, commenced in the previous reign and pursued in the present, upon this object of crimes and their punishments, which was the foundation of our modern criminal law, and forms one of the most important features in the legal history of the period, arose chiefly out of the vast increase in the number of criminals; and there can be as little doubt that this had arisen partly indeed from the disbanding of the soldiers or retainers who had been engaged in the civil wars, but principally from the gradual decline and wandering away of the villeins, and the enormous increase of vagrancy, and consequently of crime. This had impressed the late king with the necessity for a stern and severe execution of the criminal law, and the same reasons induced the present king to pursue the same policy. The execution of the common law, however, was found to be greatly obstructed by the

larceny, burning, and other crimes, to enjoy impunity, through a peculiarity in legal notions, or defects in the

privilege of sanctuary, which, attaching as it did, not only to the precincts of every church, but of almost every priory or monastery, enabled criminals in every part of the kingdom to find an easy and a speedy refuge, and if they were taken out of sanctuary, they set up this as a defence upon their trial (*Keilway*, 92). In that case, in almost the last year of the previous reign, this course was taken by a criminal who had taken sanctuary, and there are several other similar cases. No wonder that in the case of the first year of this reign an act was passed upon the subject, which led to great opposition from the clergy, and thus tended to identify them with immunity from the penalties of crime. This tended materially to lower the church in public estimation, and thus to increase the power of the movement against the old religious system, which no doubt commenced in this reign, and which, although the motives may have arisen out of royal tyranny and rapacity, nevertheless had to a great extent the support of popular feeling, chiefly on account of this apparent identification of the church with protection to crime. The same impression was produced by the privilege of clergy, which, in this reign and the last, was set up by murderers (*Keilway*, 92), and was regarded no doubt with still greater aversion. In the last reign it has been seen that the privilege of sanctuary had received a severe blow in the case of Stafford, and that the judges had been sarcastic upon the tenacity shown by the clergy in the maintenance of the privilege. So in the present reign; again and again the judges, with the whole weight of their authority, went against these obnoxious principles. "It was enacted by parliament" (says *Keilway*, a great lawyer, and law reporter of the age), "in the fourth year of the king, Henry VIII., that murderers and robbers in churches, on the highways, and of men in their houses, should be ousted of their privileges of clergy, except those in holy orders"—a most invidious exception, for which there was not the reasonable cause existing in ancient times when their privileges first arose, and when there was no real trial, but only the absurd ordeal or the barbarous battel. "And by force of this good act many common and horrible murderers and robbers were ousted of their clergy and put to execution, to the great increase and advancement of the public welfare, and the great terror of all robbers and murderers" (*Keilway*, 181). It is to be observed that our author has not adhered to the historic method or the order of time, and hence these matters in his history are not mentioned in the order in which they occurred, for which reason there is a necessity for these notes to point out that order. Upon this act arose a great controversy, which he mentions, but of which the main importance is, that it arose so early as the seventh year of the reign, nearly twenty years before the final separation from Rome, and that nevertheless it elicited from the king a most distinct and emphatic declaration of his entire sovereignty over the clergy in matters within the domain of temporal law, as crimes against life or property. And the king on that occasion said, that he would maintain his temporal jurisdiction (*Keilway*, 185). The privilege of clergy on that occasion virtually received its death-blow, though it was not formally abolished in such cases until many years afterwards. In like manner, in the next, the eighth year of the reign, a case arose in which a man arraigned of murder set off a claim of sanctuary by papal bulls in the time of Henry III., confirmed by the king. There was a great discussion, and it was said, with some scorn, that it was not to be supposed that the popes and kings who had created the privilege meant it to be a protection to wilful murderers and robbers (*Keilway*, 191), and that the law of God and man alike preferred the general good to the personal

course of justice, was thought too inconsistent with the good order and peace of society to be any longer endured.

safety of such criminals, and that their shelter was an abuse. Before long it was entirely abolished, but the clergy resisted to the last, and there can be no doubt that this greatly aided and advanced the movement against the church. When that movement had been consummated in the establishment of the royal supremacy in the place of the papal, some very sanguinary legislation was dictated by the king, in the exercise and enforcement of his new prerogative of the supremacy, and these are the first laws really and avowedly inflicting capital penalties upon the mere holding of religious persuasions or opinions. The measures noticed by this chapter include the commencement of those sanguinary laws upon religion in which the tyranny of sovereigns of the Tudor dynasty was most painfully displayed. And it is important at the outset to observe and to bear in mind that this atrocious legislation emanated entirely from the king, and arose from the spirit not of ecclesiastical bigotry, but of regal tyranny. The author had already observed that the previous laws passed upon the subject of religion had been carried on by fits, as the king's humor directed him (s. 28), and he in this chapter speaks truly of the king as absolute. In the measures already noticed in the last chapter, the king had established the royal supremacy; in the measures now to be noticed he enforced it and exercised it. These measures, as is shown by their very terms, as well as by contemporary history, were dictated entirely by himself in the plenitude of his new prerogative of spiritual supremacy; the reign of terror was at its height, and these measures were well calculated to keep it up. The most eminent persons in the realm who had ventured to oppose the king's views had been beheaded, and under such circumstances it would be idle to speak of these measures as having originated either in religious sincerity or in parliamentary authority, or to regard them as otherwise than as the edicts of a tyrant. The author justly says in this chapter that the articles of religion had been published by the king's *sole authority*; and the preamble of the statute 31 Henry VIII., c. viii., asserts the prerogative of the king, as a power given of God, to issue proclamations on the subject of religion, and give them the force of law; and the parliament, enslaved to his will, lent their sanction to this monstrous assumption. The statute of the "Six Articles" also was avowedly based upon the king's authority; and so the act of 34 Henry VIII., an "act for the advancement of true religion," made it penal to preach or teach anything contrary to what had or should be set forth by the king. The author truly observes that "the passions and caprice of the king were adopted by the legislature." Under these monstrous laws Romanists died for asserting the papal supremacy, and Protestants for denying Romish doctrines. This of itself is sufficient to show that the odium of these atrocious measures rests on neither religion, nor on the sincere profession of either, nor can be ascribed to the spirit of religious bigotry, but were the result rather of the spirit of regal tyranny and arbitrary power. It is obvious that measures of persecution against the members of both churches could not have been dictated by either. The importance of realizing the truth that the persecuting measures of this reign were dictated, not by the spirit of sincere religious bigotry, but by royal tyranny, lies in this, that as it was in this reign so it was in the other reigns of this dynasty, and that it greatly tends to allay the animosities which those unhappy reigns enkindled, and which are not even yet wholly extinguished, to realize a truth which tends to remove the obloquy of these atrocious measures from either of the two churches, and to fix it upon the odious spirit of royal tyranny and arbitrary power. These statutes came at the close of the reign, however. That it might not be supposed that

Many statutes were made for the due punishment of such enormities. Besides this modifying of common law

the rejection of the papal supremacy involved any indifference to heresy, the king (says the historian) passed in the year following the statute for the punishment of heresy, in which he ascribed his adherence to the orthodox doctrine in characters of blood, directing that all persons convicted of heresy before the ordinary of the diocese, and refusing to abjure, or relapsing after abjuration, shall be committed to the lay power, to be burned in open places for the example of others, carefully at the same time providing that no speaking against the Bishop of Rome's authority, made or given by human law, and where it is repugnant to the laws of the realm, shall be deemed to be heresy (25 *Hen. VIII.*, c. xiv.). Thus for the first time in our history the doctrine of persecution merely for heresy in religious belief (for, as has been shown, the earlier statute was professedly passed against a heresy political as much as religious, and rather upon reasons of state policy than of religious orthodoxy) was embodied in a statute dictated by a despotic monarch at the very moment he had established his supremacy, and inspired, it is evident, far more by the spirit of tyranny than of bigotry. There can be no doubt that the measures passed in the reign of Henry VIII. after the execution of Buckingham were passed under terror of the royal power. Of this there is overwhelming testimony. With respect to the measures for the suppression of religious houses, "we are assured," says Sir J. Mackintosh, "by Sir Thomas More that, in all his time, of all the nobility of the land, he found no more than seven that thought it right or reasonable to take away the possessions of the clergy" (*Hist. Eng.*, vol. ii.). And in another place, the historian accounts for the conformity of the clergy to the claim of the royal supremacy "by the terror inspired by Henry's sanguinary government" (*Ibid.*, vol. iii., c. i.). "The next act of Henry," says the historian, "as head of the church, was to frame a creed, guarded by sanguinary penalties, for the species of neutral and intermediate religion which he had established" (*Ibid.*, vol. ii., c. iii.), that is, it was entirely a matter of the king's arbitrary will. Our author truly shows that throughout the whole of this prince's reign he seems to have enjoyed the full gratification of his absolute will and caprice, and that a concurrence of events had produced a state of things which enabled him, beyond the example of any of his predecessors, to tyrannize over all ranks of men, and over the laws themselves, or when that was not safe, to cause such laws to be made as would warrant and legitimate every act of power (*Vide post*, conclusion of c. xxx.). And that, not content with sovereign dominion over law and justice, he attempted to govern impossibilities and reconcile the plainest absurdities (*Ibid.*). It was the unhappy fate of the English during this age, that when they labored under any grievance, they had not the satisfaction of expecting redress from parliament. On the contrary, they had reason to dread each meeting of the assembly, and were then sure of having tyranny converted into law, and aggravated perhaps with some circumstances which the arbitrary prince and his ministers had not hitherto devised, or did not think proper of themselves to carry into execution. This abject servility never appeared more conspicuously than in a new parliament which the king now assembled, and which, if it had been so pleased, might have been the last that ever sat in England. But he found them too useful instruments of dominion ever to entertain thoughts of giving a total exclusion (*Hume's Hist. Eng.*, c. xxxii.). The murder of Buckingham in the early part of the reign, followed up as it had been more lately by the murder of Fisher and More, had produced the most slavish subserviency, and parliament passed laws at the king's pleasure. Thus, after having passed laws which rendered it a capital offence to maintain the papal supremacy,

offences, the character of the times, and that of the prince upon the throne, contributed to the enacting of

parliament now, at the king's dictation, enacted the atrocious "Six Articles," by which the denial of such articles of faith as the king chose to retain subjected the person to the death by fire (31 *Hen. VIII.*, fol. 14). And commissioners were to be appointed by the king for inquiry into these heresies (*Ibid.*). "The king," says the historian, "in passing this law laid his oppressive hand on both parties" (*Ibid.*). And he goes on to state: "The parliament having thus resigned all their religious liberties, proceeded to an entire surrender of their civil; and without scruple or deliberation they made, by one act, a total subversion of the English constitution. They gave to the king's proclamation the same force as to a statute enacted by parliament; and to make the matter worse, if possible, they framed other laws, as if it were only declaratory and were intended to explain the natural extent of royal authority" (*Ibid.*). The king had appointed a commission, and, by virtue of his ecclesiastical supremacy had given them a charge to choose a religion for his people. Before the commissioners had made any progress in this arduous undertaking, the parliament in 1541 had passed a law by which they ratified all the tenets which these commissioners should thereafter establish with the king's consent (*Ibid.*). It was, indeed, enacted, that the commissioners should establish nothing repugnant to the laws and statutes of the realm. But in reality this proviso was inserted by the king to serve his own purposes. By introducing a confusion and contradiction into the laws, he became more master of every one's life and property; and he was well pleased, under cover of such a clause, to introduce appeals from the spiritual to the civil courts. It was for a like reason that he would never promulgate a body of canon laws; and he encouraged the judges, on all occasions, to interpose in ecclesiastical causes, whenever they thought the law of royal prerogative concerned (*Ibid.*). The parliament facilitated the execution of the law by which the king's proclamations were made equal to statutes. They appointed that any nine councillors should form a legal court for punishing all disobedience to proclamations. The total abolition of fines in criminal causes, as well as of all parliaments, secured, if the king had so pleased, the necessary consequences of this enormous law. He might issue a proclamation enjoining the execution of any penal statute, and afterwards try the criminal, not for breach of the statute, but for disobedience to his proclamation. It was enacted that any spiritual person who preached or taught contrary to the doctrine contained in the king's book, or contrary to any doctrine which he might thereafter promulgate, was, on a third offence, to be burned. The act of the Six Articles was still in force. But in order to make the king more entirely master of his people, it was enacted, that he might thereafter, at his pleasure, change the act, or any provision in it. By this clause both parties were retained in subjection. So far as regarded religion, the king was invested, in the fullest manner, with the sole legislative authority in his kingdom. And all his subjects were, under the severest penalties, expressly bound to receive implicitly whatever doctrine he should please to recommend to them (*Hume's Hist.*, cxxxiii.). The prostrate spirit of the parliament further appeared in the preamble of a statute, in which they recognized the king to have always been, by the Word of God, supreme head of the Church of England, and acknowledged that archbishops, bishops, and other ecclesiastical persons, have no manner of jurisdiction, but by his royal mandate. To him alone, they said, and such persons as he should appoint, full power and authority was given from above, to hear and determine all causes ecclesiastical, and to correct all manner of heresies, errors, vices, and sins whatever. No mention was made of the concurrence of convocation, or even of parliament.

many new crimes, with new methods of trial and punishment; all of which, together, exhibit a greater show of

His proclamations were in effect acknowledged to have, not only the force of law, but the authority of revelation; and by his royal power he might regulate the actions of men, control their words, and even direct their inward sentiments and opinions (*Ibid.*). By the devoted submission of the parliament to his will, all the king's caprices were blindly complied with, and no regard paid to the safety or liberty of the subject. Besides the violent persecution of what he was pleased to term heresy, the laws of treason were multiplied beyond all former precedent (*Ibid.*). It is impossible not to see in all this the results of real tyranny, rather than of religious bigotry, for religion itself was reduced to slavish subserviency to the royal will. The same spirit will be found to have pervaded the reigns of the subsequent sovereigns of the same dynasty. In all will be traced the same spirit of tyranny, the same spirit of arbitrary power, and an utter absence of any principle but that of maintaining such power. Parliament merely registered the edicts of the sovereign. Thus in speaking of the acts to suppress the monasteries, Spelman states that it would not pass until the king sent for the commons, and told them that he would have the bill pass, or take off some of their heads (*Hist. of Sacrilege*, p. 187); and Sir Thomas More stated that he hardly knew the persons who were really in favor of the measure (*Mack. Hist.*, vol. iii.). So our author himself, in this chapter, says truly, "The attack upon the papal authority, and the reformation of abuses among the clergy, was carried on by fits, as the king's humor directed him; and they fill, on that account, a multiplicity of statutes" (*Vide post*). Well might he therefore say, in the sentence at which this note commences, "In every regulation of a judicial nature made in this reign, we perceive the marks of a decisive hand." No doubt a most decisive hand. And that hand was the king's; a hand which dealt death to whomsoever durst to oppose him. "The creed was neither completed nor sufficiently fenced round by terrible penalties till an act was passed by which any one who spoke against the king's doctrine of the sacrament was to be adjudged a heretic, and to suffer death by burning" (*Ibid.*). The cruelty of Henry continued conspicuous to the last in the alternate persecution of Lutherans as heretics, and of Papists as traitors (*Ibid.*), both classes alike being, it is obvious, really executed for opposition to the royal will. Towards the close of the reign the submissive parliament passed an act that proclamations by the king in council should be obeyed as though they were made by act of parliament, under such pains as such proclamations shall appoint, providing that the punishment shall not extend to death, *except in case of heresy* (*Ibid.*), the effect of which was to give the king power to declare any thing he pleased heresy, and to punish it by death (*Ibid.*). And offenders were to be tried in the court of Star Chamber. In the meantime, however, in the course of the reign, a number of measures were passed which form the foundation of our modern criminal law. These measures were mainly rendered necessary by reason of the change in the character of crime which took place at this era. Hitherto they had been almost entirely crimes of violence, but now they often partook of the character of fraud. Hence various statutes passed to repress offences of that character: the statute as to cheating by false tokens, for instance, the basis of our modern law of false pretences and forgery (33 *Hen. VIII.*, c. i.); the statute as to embezzlement (21 *Hen. VIII.*, c. vii.), in like manner the basis of our modern law on the subject (*R. Watson*, 2 *East*, P. C., 562); so as to trial of offences committed out of the realm. The great feature in the criminal legislation of this reign was the number of new treasons created, and above all, the strange and terrible severities imposed upon offences against the new prerogative of the

novelty than had been introduced in our criminal law in any of the preceding reigns.

The penal statutes of this reign may be naturally divided into such as concern religion, and the king's person and government; those which regard inferior offences; and such as make any change in the mode of trial at common law, or in any other way affect the punishment of offenders; and, lastly, those that respect the benefit of clergy and sanctuary.

The penal acts relating to the king's person and government, and to the alteration made in religion, constitute the first head of inquiry; these were all repealed by stat. 1 Edward VI., c. 12, and not one of them has any influence on the body of our law in force at this day. Notwithstanding this, they are extremely worthy of observation, when considered in an historical light. These laws were entirely of a new impression, totally differing from any that had gone before, both in the description of crimes, and the severity with which they punished them. In these statutes treason and misprision of treason were made the consequence of every action and every word that tended to affect the regal

Many new treasons created.

spiritual supremacy of the crown. "This variety of penal laws," says our author, "shows a want of temper in the legislation which is barely to be paralleled. The passions and caprice of the king seemed to be adopted by the parliament, which condescended to enforce by statute everything he could ask or wish, or having for law the strangest inventions that ever were thought worthy to become the subjects of penal jurisprudence" (*vide post*). These, the coarse caprices of a savage and sanguinary tyrant, have long passed away, though many of them were continued throughout the duration of the dynasty, and led to the great rebellion; and would be hardly worth notice, but that they show the slavish subserviency of the parliament. The statutes made, however, as to common offences, though not so numerous, are, says our author, of considerable importance, and were, many of them, in force in his day; and though they have mostly been superseded by more modern legislation, yet, as they formed the basis for that legislation, they require to be studied as containing the germinal principles of later legislation. One of the most remarkable characteristics of the reign of this sovereign and his successors, and one of the most striking proofs of the complete ascendancy of the law, by means of the supremacy of the royal power, was the stern execution of the law upon persons of the highest rank, even upon peers, even for private or ordinary crimes, and not merely for such as were political. Thus, for instance, in this reign, Lord Dacres was executed on a strict application of the doctrine of constructive murder; and in the reign of Mary, in like manner, Lord Stourton was executed for murder, in spite of all efforts to save him from a doom so disgraceful to his order. This complete ascendancy of the administration of ordinary criminal justice over persons of the highest rank and position is one of the most important features of this era in our legal history, and perhaps we owe it indirectly to the Star Chamber.

dignity; the obedience of men was secured by oaths, and the discovery of guilt facilitated by methods unheard of in the common law. Though these statutes were all abrogated, yet the offences therein created were revived in the subsequent reigns, with inferior penalties; and many of their regulations were followed in similar circumstances: so that these laws gave rise to a new species of criminal jurisprudence, which has been adopted occasionally ever since; tempered, however, with greater show of moderation. For these reasons, as well as to display their peculiar style and extravagance, we shall treat them fully, and that nearly in the order in which they were made.

It was not till the 25th year of his reign that Henry had involved himself in measures which forced him to such acts of violence as marked his government for sanguinary and tyrannical. Having parted with his queen, Catherine, embroiled himself with the emperor and the pope, and taken the resolution of throwing off the papal yoke, he found himself under a necessity of securing what he had done by an act of parliament, which was to confirm the divorce and the marriage with Anne Boleyn, and to settle *the succession* of the crown upon the issue of that marriage. Stat. 25 Henry VIII., c. 22, was passed for this purpose. After giving the sanction of parliament to the steps which had been lately taken by the king respecting his two queens, it enacted, that if any person by writing, or imprinting, or by any exterior act or deed, maliciously procured, or did anything to the peril of the king's person, or gave occasion, by writing, print, deed, or act, whereby the king might be disturbed of the crown, or by writing, print, deed, or act procured, or did anything to the prejudice, slander, or derogation of Queen Anne or her issue by the king, so as to interrupt their title to the crown, as limited by that act, such offence should be high treason. And if any persons, *by words only*, should publish or utter anything to the peril of the king, or slander of the marriage with Queen Anne, or to the slander or disherison of the issue of that marriage, it was made misprision of treason. All persons of full age were to take an oath to fulfil and maintain the objects of that act; and those who refused to take such oath when required, were to be held guilty

Treason by writing or speaking.

of misprision of treason; the precise form of which oath was afterwards prescribed by stat. 26 Henry VIII., c. 2.

When the way was once pointed out of surrounding the king's person and dignity with new-made treasons, and of binding people to their duty and allegiance by express and formal oaths, we shall presently see how ready the parliament was, on every occasion, to fabricate and alter, as circumstances changed, these fresh devices for the security of government and religion.

In the very next year an act was passed in order to restrain "all manner of shameful slanders and dangers which might happen to the king's person, or that of the queen." It was by stat. 26 Henry VIII., c. 13, made *high treason* if any one did maliciously *wish, will, or desire by words, or writing, or by craft* imagine, invent, practise, or attempt any bodily harm to the person of the king, queen, or of their heir-apparent, to deprive them of their dignity, title, or name; or if any did slanderously and maliciously publish and pronounce, by express writing or words, that the king was heretic, schismatic, tyrant, infidel, or usurper (which latter words were intended to bridle the insolence of some friars); or if any withheld from the king his castles, fortresses, or holds, or rebelliously detained any of his ships, ordnance, artillery, or munition, and did not deliver them up within six days after proclamation. This act, besides taking away sanctuary in cases of high treason, increased the forfeiture upon attainder, by declaring that all lands, tenements, and hereditaments, *of any estate of inheritance*, in use or possession, should be forfeited, which words included estates tail.

By the last act, we find that only *exterior acts and deeds* (as the preceding statute expressed it), and writing, but words expressive of a *wish* were made treason. We shall soon see that the legislature laid the same penalty upon the *thoughts or belief* of men,¹ if expressed by words. After stat. 27 Henry VIII., c. 2, which made it treason to counterfeit the king's sign-manual, privy-signet, or privy-seal, there follows stat. 28 Henry VIII., c. 7, made for *the succession of the crown*, after the death of Anne Boleyn and the king's marriage to his queen Jane. The former act of

¹ Stat. 28 Hen. VIII., c. 7, 21.

succession was thereby repealed; and now, similar provisions were made in favor of the issue and succession by this new marriage. The king being empowered, in default of issue, to appoint a successor by letters-patent, or by will, it was made high treason to interrupt the succession of the issue, or of the persons so appointed by the king.¹ It was made high treason to procure or do anything by words, writing, print, or deed, *for the repeal* or avoidance of that act; and the slander of the queen and her issue, or the doing anything to the peril of the king's person, was made high treason in the very terms of the former act of succession. It was moreover made high treason if any one by words, writing, imprinting, or any other exterior act, directly or indirectly, accepted, took, *judged*, or *believed* the marriages with Queen Catherine and Anne to have been good and lawful, or slandered the sentences of the archbishop therein, or took, accepted, named, or called any of their children legitimate; or craftily imagined, invented, or attempted, by color of any pretence, to deprive the king, queen, or their heirs, or those the king should appoint, of any of their titles, styles, or regal power.

But the most singular part of this act was the following clause, which enacted that if any, being required by commissioners properly authorized to make oath to answer such questions as should be objected to him upon any clause, article, sentence, or word in that act, *did contemptuously refuse to make such oath, or, after making it, refused to answer*, he should be guilty of high treason, a species of examination unknown to the ancient common law of the country. The act even goes further, and says, that "if any protested that they were not bound to declare their thought and conscience, and stiffly thereon abided," it should be high treason; so little ashamed were the makers of this act to be confronted with the mischiefs that would naturally ensue from it, and so ready were they to undertake the cruel task of obviating the consequences of former severities by imposing new ones. This act contained one more treason, which was in case any one refused to take the oath prescribed for the observance of it, the former oath of a similar import being repealed and dispensed with.² The matter of this act was so various,

¹ Sect. 18-20.

² *Ibid.*, 24, 25.

and of such a peculiar kind, and the manner in which it might be enforced so insidious, that it became an engine in the hands of government by which they might catch any man whom they wished to destroy. This act is a strong instance how absolute Henry had become when the parliament conferred on him the power to dispose of the succession to the crown.

This was followed by an act¹ to extinguish the authority of the Bishop of Rome. There is a long preamble, stating the usurpations of the pope in spirituals and temporals; and that, notwithstanding the laws which had lately been made, "divers seditious and contentious persons, being imps of the said Bishop of Rome, do, in corners and elsewhere, whisper, inculke, preach, and persuade, and from time to time instil into poor and unlettered people the advancement and continuance of the said bishop's feigned and pretended authority." For these reasons it was enacted, that if any one by writing, ciphering, printing, preaching, or teaching, deed or act, obstinately or maliciously held or stood with, to extol, set forth, maintain, or defend the authority of the Bishop of Rome, or invented anything for the advancement of it, he should incur the penalties of stat. 16 Richard II., c. 5, that is, a *præmunire*,² being a process originally contrived for repressing the encroachments of papal power. To engage all persons in an express obligation to suport the king against the pope, an oath was framed, by which the taker renounced the pope and all his authority and jurisdiction; and this oath was to be taken by all officers and ministers, spiritual and lay, every religious person, all those who took orders, or any degree in the university; and it was made high treason to refuse this oath when it was required to be taken; so that all hopes of reconciliation with the Church of Rome seem cut off by this statute.

That the king's power to dispose of the crown might not be thwarted or interrupted by the marriage of any of his family against his will, it was, by stat. 28 Henry VIII., c. 18, made high treason, both in the man and woman, if any one espoused, married, or took to wife any of the king's children, being lawfully born, or otherwise commonly reputed for his children, or any of the king's

¹ Stat. 28 Hen. VIII., c. 10.

² *Vide* vol. iii.

sisters, or aunts on the part of the father, or any of the lawful children of the king's brethren or sisters, or even to contract marriage with them, without the king's license under the great seal, or to deflower any of them, being unmarried. These were the penal laws made in this short parliament, in the 28th year of the king.

The next treason that was made was to enforce obedience to the king's proclamations. The late proceedings of the king about the articles of religion, and other injunctions which had been published by his sole authority, had been excepted against as contrary to law; because the king had, without consent of parliament, altered some laws, and laid taxes on his spiritual subjects.¹ This occasioned the famous statute 31 Henry VIII., c. 8. The preamble of this act sets forth "the contempt and disobedience of the king's proclamations by some who did not consider *what a king by his royal power might do*; which, if it continued, would tend to the disobedience of the laws of God, and the dishonor of the king's majesty, who may full ill bear it. Considering also that many occasions might require speedy remedies, and that delaying these till a parliament met might occasion great prejudices to the realm; and that the king, by his royal power *given of God, might do many things* in such cases;" it was therefore enacted, that the king for the time being, with advice of his council, might set forth proclamations, with pains and penalties in them, which were to be obeyed as if they were made by an act of parliament. This, however, was not to go so far as that any one should suffer in his estate, liberty, or person, by virtue thereof, nor that by any of the king's proclamations the laws or customs of the realm should be subverted. The statute directs the method in which these proclamations were to be issued, and how those should be punished who disobeyed them; and then adds, that if any offended against them, and in further contempt, went out of the kingdom, it should be high treason. The same power of issuing proclamations was given to the counsellors of the king's successor while under age, with the like penalties for disobeying them; a power of which the Protector, in the next reign, availed himself, in order to bring about the changes in religion.²

¹ Burn. Ref., vol. i., 251.

² Ibid., 252.

In the same parliament was passed the famous act of the six articles, styled, "*An Act for Abolishing Diversity of Opinions*," by which the parliament enacted six of the strongest points in the Romish religion, under the severest penalties. The preamble says, that "the king hoped that a full and perfect resolution of the said articles should make *a perfect concord and unity amongst all his subjects*" (a). The ready way to effect this, it was thought, would be, to establish them by law, since the convocation of bishops and learned men had agreed upon them as settled orthodox doctrine. It was therefore enacted, by stat. 31 Henry VIII., c. 14, *first*, that if any one by word, writing, printing, ciphering, or any otherwise, did teach, preach, dispute, or hold opinion against the real presence, he should suffer death as a heretic by burning, and forfeit as in case of high treason; *secondly*, that if any one preached in any sermon or collection openly made, or taught in any common school or congregation, or obstinately affirmed or defended, that the communion in both kinds was necessary; or *thirdly*, that priests might marry; or *fourthly*, that vows of chastity might be broken; or *fifthly*, that private masses should not be used; or *sixthly*, that auricular confession was not expedient; it should be adjudged felony. To these it was added, that if any priest, or any other who had vowed chastity, did marry, or contract matrimony; or if any priest who was or should be married, did carnally use his wife, or any woman to whom he was contracted, or *was openly conversant or familiar with*, both the man and the woman should be guilty of felony. The severe branch against unchaste practices was not relished by the popish clergy, and is said to have been put in by Cromwell to make this bloody law cut with two edges. If that was the design, the clergy got relieved from this well-intended stroke the next year, when, by stat. 32 Henry VIII., c. 10, this latter part of the law was changed from felony to forfeiture and imprisonment.

After this act of the six articles, there was another brought in by Cranmer, which was intended to mitigate the late laws about religion. In this measure the king

(a) It will be observed that the measure was avowedly based entirely on the royal will and pleasure, and it will be seen that it was aimed at the profession of both religions, and was therefore not dictated by either.

very readily concurred, being then engaged in a war, and wishing everything to remain quiet at home. This was stat. 34, 35 Henry VIII., c. 1, entitled, *An Act for the advancement of True Religion, and abolishment of the contrary*. One design of this provision was to put a stop to the use of Tindal's translation, and to promote the reading of the authorized translation in English; after which it enacted, that if any spiritual person did preach, teach, defend, or maintain, any matter or thing contrary to the good instructions and determinations *that had or should be set forth* by the king, he should, for the first offence, recant; if he refused to recant, or offended a second time, he was to abjure, and bear a fagot; which if he refused to do, or offended a third time, he was to be burnt as a heretic. But lay persons so offending were, for the third offence, or for refusing to abjure and bear a fagot, only to forfeit all their goods, and suffer perpetual imprisonment; so that the laity offending against the six articles and other popish doctrines were entirely freed from the hazard of burning, and the spirituality suffered only on the third conviction. They were also permitted to bring witnesses in their defence.¹

The marriage between the king and Anne of Cleves being pronounced void, an act passed to confirm the sentence; and it was now declared, as it had been on former occasions of the same kind, that by word or deed to accept, take, judge, or believe that marriage to be good, or to attempt to repeal that act should be high treason. This was by stat. 32 Henry VIII., c. 25. In the following year, another of this whimsical monarch's unfortunate queens gave occasion to the penalty of high treason being inflicted on transactions of a very nice and singular nature. Queen Catherine Howard was attainted by stat. 33 Henry VIII., c. 21, of high treason for incontinence; and it was enacted further, that if the king, or any of his successors, should marry a woman who was before incontinent, it should be high treason if she concealed it; and any person knowing it, and not revealing it to the king, or one of his council, before the marriage, or within twenty days after, should be adjudged guilty of high treason. Further, if the queen, or wife of the prince, should, by writing, message, words,

¹ Burn. Ref., vol. i., 308.

tokens, or otherwise, move any one to have carnal knowledge with them, or any others should move either of them to that end, it should be high treason.

A *third act* was made for the *succession* to the crown, which entirely overturned the former appointments: this was stat. 35 Henry VIII., c. 1. There was a new oath, devised in place of that being sworn, as well against the supremacy of the pope as to maintain the succession ordained by that act. It was made high treason to refuse that oath, or to do anything contrary to this act, or to the peril and slander of the king's heir, as limited therein. The king's style and title was settled by stat. 35 Henry VIII., c. 3, in the following words: "Henry VIII. by the grace of God, King of England, France and Ireland, Defender of the Faith, and of the Church of England, and also of Ireland, in earth the Supreme Head;" and it was declared high treason to attempt to deprive him of it.

This variety of penal laws shows a want of temper in the legislature, which is hardly to be paralleled. The passions and caprice of the king seemed to be adopted by the parliament, which condescended to enforce by statute everything he could ask or wish; ordaining for law the strangest inventions that ever were thought worthy to become the objects of penal jurisprudence.

It follows, that we should now speak of such statutes as were made respecting common offences: these, though not so numerous as the former, were of considerable importance, and are many of them in force at this day. The variation made in the crime of larceny by some that have already been mentioned, acquires a more particular notice; after these, we shall proceed to other felonies; and, lastly, to misdemeanors; but first it will be proper to consider two statutes relating to homicide, which are the only two in this reign upon that head.

One of these statutes was to remove a doubt concerning the killing a robber. We have seen that in former times a person killing a housebreaker went without punishment.¹ But now, the statute 24 Henry VIII., c. 5, says, there was "a question and ambiguity," whether, when persons attempted to commit robbery or murder, in or nigh the common highway, cart, horse, or footway, or in a

¹ *Vide ante.*

mansion-house, messuage, or dwelling-place, or feloniously attempted to break a dwelling-house in the night-time, and were killed in such attempt by the person they meant so to rob or murder, or by any person being in their dwelling-house, so attempted to be burglariously broken, whether the person killing was to forfeit his goods, as in chance-medley: to remove this doubt, the statute declares, he shall not suffer any kind of forfeiture, but be as fully acquitted and discharged as if he had been acquitted of the fact.

The other statute concerning homicide is very remarkable; and as it enacted a new treason, it might perhaps have been ranked among that series of Punishment of poisoning. acts. This is stat. 22 Henry VIII., c. 9. It was occasioned by one Richard Roose, a cook, having put some poison into a vessel of yeast, in the Bishop of Rochester's kitchen, by means of which seventeen persons of the bishop's family, and several others, were poisoned, and died. This very heinous offence raised a kind of indignation in the legislature; and it was declared by that act, that the said poisoning should be adjudged high treason, that Richard Roose should be attainted accordingly, by authority of parliament, and should be boiled to death; and, as if none would commit this offence but such as were of the same employment with the present offender, it was enacted, not only that henceforth every wilful murder by means of poisoning should be high treason, but that such offenders should all be boiled to death.

It became necessary that the crime of larceny should be punished in a severer manner than it had been Of larceny. at common law. The occasions and temptations to commit this crime were much increased, since the improvements in arts and commerce had supplied the articles of personal property in greater number; and as those were often costly, and made a part of dress, or of the furniture of houses, there was need of additional penalties to guard them from violation. Besides these considerations, a dwelling-house, on all accounts, deserved every protection the law could afford it. Stealing in this only place of security for a man's property called for a more exemplary punishment, but more particularly when attended with violence of any kind. To these causes may be ascribed the statutes made in this and the subsequent

reigns concerning larceny; what those were we shall now inquire.

The definition of larceny, after various changes, had, as we have seen in the reign of Edward IV.,¹ become settled in the following terms: *The felonious taking and carrying away of the personal goods of another.* In judging of offences, courts were tied up to this definition, and often found themselves embarrassed by a strict construction of it. To correct this, and to punish in a manner adequate to the crime, the aid of the legislature had sometimes been called in to enlarge the terms of this definition in particular instances. Thus it was made larceny to steal hawks by a statute of Edward III., and to steal records by one of Henry VI.,² neither of which being *personals*, could be brought within the letter of the above definition.

Those two statutes respected the *objects* of larceny. The stat. 21 Henry VIII. applied to another part of this definition, and assisted in ascertaining, at least in one instance, what should be deemed a felonious *taking*. A breach of trust, and embezzlement of effects confided to the custody of a person, were thought not to be a *felonious taking and carrying away* (a). This kind of fraud had of late grown

(a) The following case arose upon this statute. A servant received money upon an obligation on a sale of goods, and went his way with the money. It was thought that the case was not within the statute, for he had not had the money by delivery of his master; otherwise, if he had the money by delivery of another servant of his master, for that was a delivery by his master *per alium*; also, if he went away with an obligation, it was thought not within the statute, for it was a *chose en action*, and not valuable, whereas the words of the act were, "goods to the value of forty shillings." But that was doubtful, for Fitzherbert said that by grant *de omnia bona et catalla* an obligation would pass (*Dyer's Reps.*, 3; 25 *Hen. VIII.*). This case is an illustration of the strict construction put upon penal statutes, especially with respect to offences made capital. All felonies were so in this age. There was a subsequent statute, 5 Elizabeth, c. x., by which it was held no larceny in a servant, either on stat. 21 Henry VIII., c. vii., or at common law, who embezzled money delivered to him to purchase goods with (*Rex v. Watson*, 2 *East, P. C.*, 562). A carter going away with his master's cart was holden a felony (*Rex v. Robinson*, 2 *East, P. C.*, 565). There was afterwards another statute on the subject, based on the principle of the older act, the 39 George III., c. lxxxv., which, however, did not apply to cases which were larceny at common law (*Rex v. Hedge*, 1 *R. & R. C. C.*, 160; 2 *Leach, C. C.*, 1033). That statute extended only to such servants as were employed to receive money, and to instances in which they received money by virtue of their employment (*Rex v. Mellish*, *R. & R. C. C.*, 80; *Russ. C. & M.*, 209.) The statute did not make the crime of embezzlement a new statutable felony, but only made it a larceny (*Rex v. M'Gregor*, *R. & R. C. C.*, 23; 3 *B. & P.*, 106; 2 *Leach, C.*

¹ *Vide* vol. iii.

² *Vide* vol. iii.

common, from the impunity it enjoyed; and many now thought that, as it carried in it much of the mischief, it deserved the punishment annexed to felony. It was accordingly enacted, by stat. 21 Henry VIII., c. 7, that if a servant, to whom caskets, jewels, money, goods, or chattels, have been delivered to keep, Servants embezzling goods. withdraw himself, and go away with the same, or any part thereof with intent to steal, contrary to the trust and confidence reposed in him; or if, being in service, without assent of his master he embezzle the same, with intent to steal or convert to his own use, to the value of forty shillings, it shall be felony. It is mentioned in the preamble of this act, as a doubt whether this kind of taking was larceny; a doubt raised, perhaps, by the case determined in 13 Edward IV.,¹ which we have before mentioned, and which is thought, and not improbably, to have given some occasion for making this statute.

Though the instance of bailment there before the court was or might be thought something like this of trusts reposed in servants, and was determined to be felony, yet the principles there laid down and agreed to, almost unanimously, led to an opposite conclusion; and there needed all the helps of distinctions and technical nicety to take even that case out of the general rule there laid down. Besides, there is at the bottom of that report an opinion which qualifies any inference which otherwise might be possibly drawn from it as to this point; for, admitting that a cook and a butler would be guilty of felony if they converted the goods within their respective departments to their own use, it is there said, that if the same things were bailed to a servant, *perhaps*,² as they would be in his possession, he could not commit felony of them.³ About three years before, it was said by one of the judges, "If one commits the care of his goods to his servant, the servant cannot take them feloniously, because they were in his possession."⁴ These were direct

C., 932; 2 *East*, *P. C.*, 576). By the stat. 7 and 8 George IV., c. xxvii., the stat. 33 Henry VI., c. i., 21 Henry VIII., c. vii., 5 Elizabeth, c. x., and by the stat. 9 George IV., c. 31, the stat. 3 George IV., c. xxxviii., are wholly repealed. Embezzlement of money by a servant not authorized to receive it was not within 7 and 8 George IV., c. xxix., s. 47 (*Rex v. Thorley*, *M. C. C. R.*, 343).

¹ *Vide* vol. iii.

² 13 Edw. IV., 10.

³ *Per aventure*.

⁴ 10 Edw., 14. Bro. Coro., 155. *Vide* vol. iii.

authorities upon the point, and, joined with the reasoning upon *bailment* and *possession*, sufficiently show what were the opinions of lawyers in those times respecting this question.

So strictly have courts adhered to the notion of possession, and its consequences, that in 3 Henry VII. the judges went so far as to agree with Brian (who, it may be observed, was one of the judges that dissented from the opinion of felony in 13 Edward IV. in the exchequer chamber), that neither a shepherd nor a butler could commit larceny of their sheep or plate, because it could not be done *vi et armis*,¹ so much were the opinions changed from what they had been in the reign of Edward IV., when these cases were stated for felony, and allowed without debate. This doctrine, we have seen, was again discussed in the last reign; and it seemed, in the instance there stated, to be agreed upon so decidedly against the felony, as to call for a formal declaration of the law by statute. Thus stood the law upon this subject towards the end of Henry VII.'s reign, and so we may suppose it was understood at the time the statute was made. After all these authorities, we may be excused in differing from those² who think that the point of law which is the subject of this statute was so well settled before that the doubt about it mentioned in the preamble is one of those which have much enervated the principles of the common law, and could not be the doubt of any lawyer.

Clergy was taken from this new felony by stat. 27 Henry VIII., c. 17, which statute was excepted in the general repealing law, stat. 1 Edward VI., c. 12; but because the commencement of the sessions was misrecited, it was held³ that the saving was of no effect: so that stat. 27 Henry VIII., c. 17, stood repealed, and stat. 21 Henry VIII., c. 7, continued a clergyable felony, till the general repealing act of Queen Mary, where, among other felonies, it was repealed; it was afterwards revived by stat. 5 Elizabeth, and is in force at this day.

Thus far the definition of larceny was extended in some particular cases as to the *object* of it, and the *mode of taking*. There was another consideration of this offence which deserves notice; and that was, *the circumstances under which it might be committed*.

¹ Bro. Coro., 137.

² Barr. Stat., 478, 479.

³ Plowd., 399.

The time or place where a theft was committed made no part of the legal notion of it. Whether it was in a house or from the person (unless from Larceny in a house. the person violently, and by putting in fear, for then it was robbery, a crime of a very different nature), the additional audacity of the offender constituted in law no additional degree of guilt: so the law had been for many centuries. The attendant circumstances of aggravation under which this crime might be committed, drew the notice of the legislature now, for the first time. In this and the subsequent reigns many laws were made concerning *stealing in a house*, making altogether a collection of statutes so very similar as to render it difficult to distinguish the different aim and object of some of them.

These statutes we shall hereafter notice among those which took away clergy; but we must touch on them now, with a view of pointing some observations to the subject we are upon at present. The first of them is stat. 4 Henry VIII., c. 2, which took away clergy from all felonies committed in a church, or hallowed place; from robbery or murder in the highway, or *in a house*, the owner, his wife, child, or servant, within, and put in fear. This new regulation, being a temporary law, was suffered to expire; and these offenders were left once more to their former impunity, till stat. 23 Henry VIII., c. 1, took away clergy from those who *rob any person in his dwelling-house*, the owner, his wife, child, or servant, then being within, and put in fear. It takes away clergy also from those who rob any church or chapel, or other holy place; from murder; robbery in or near the highway; from burning a dwelling-house, or barn with corn or grain; and from petit treason. This statute includes also accessaries before the fact.

There is something in the wording of this statute that is worthy of observation: it is the different construction which has been put on the same expression when applied to different subjects, namely, *to rob*, when it is meant of a house, and when of a person. The words are, *if any rob any person in his dwelling-house*, etc., and, *if any rob another in or near the highway*, etc.; the obvious and plain construction of which clauses, on the first view, should seem to be, that the locality of the offence *in or near the highway*, or *in a dwelling-house*, were the only circumstances particularly necessary to be defined.

But doubts arose, soon after the statute, whether the parliament had not something more in view than a mere robbery *from the person in a house*, and did not really intend by those words to signify the robbery *of a house*. To explain this doubt, and give this act the full effect which, probably, it was at first intended to have, the stat. 5 and 6 Edward VI., c. 9, were made to explain the very passage now under consideration, concerning which there had arisen some doubts: to resolve which that act declares, that though the owner be *in any part* of the house, or *precinct* of the same, yet still the robber should lose his clergy. After this explanation, the difference between robbing a person *in the highway* and *in a dwelling-house* first originated. For what could this *robbing a person in a house* be? It could not be a robbery, properly so called, for that must be from the person, and with violence, which could not be the case here; for the explanatory words say, that the person might be in any other chamber of the house; nor could it be with violence, for the statute says, it might be committed while the person was asleep: which is a condition not compatible with the violence necessary to constitute a proper robbery. It only remained to imagine a kind of *constructive* robbery, by supposing the violence committed on the house, and not on the person. Consistently with this, robbing a person in a house has been construed to signify a violence done to the house by *breaking*, as well as a stealing. Later statutes have pursued this notion, only expressing it less equivocally, in the phrase of *robbing a house*, instead of *robbing a person in a house*.

By stat. 3^d Henry VIII., c. 12,¹ clergy was taken away from persons stealing in any of the king's houses, whether with a breaking or without.

There is only one more statute relating to robbery, which we shall now mention.* We have seen that in an appeal the party prosecuting not only procured a punishment to be inflicted on the offender, but also recovered the thing stolen. This was not so in an indictment; and as this mode of prosecuting was now more practised than formerly, it was intended to render it equally advantageous to the person resorting to it. It was accordingly enacted, by stat. 21 Henry VIII.,

Robbery.

¹ Sect. 27.

c. 11 (a), that if a man robbed or took away any money, goods, or chattels, from the person, or otherwise, and is indicted, arraigned, and found guilty thereof, or otherwise attainted, by reason of evidence given by the party, or by procurement of the party so robbed, or the owner of the said money or goods, the person robbed, or the owner of the things, shall be restored to them (b); and the jus-

(a) By the stat. 7 and 8 George IV., c. xxvii., the stats. 23 Henry VIII., c. i., and 3 William and Mary, c. ix., are repealed, as is the stat. 1 Edward VI., c. xii., so far as relates to this subject.

(b) At common law, felony did not alter property, and so, unless the property had been changed by sale in market overt, the owner was entitled to the things stolen; but if so changed, he had no remedy at common law, except by restitution after an appeal, on fresh pursuit (2 *Inst.*, 714). The process of *appeal*, which was a criminal prosecution at the suit of the *party*, was especially adapted to restitution. Supposing the property had not been sold to an innocent purchaser, there would be no difficulty in restitution; for although the crown was entitled to "felons' goods," upon conviction, and numerous royal charters had granted this right as a franchise to subjects, felons' goods, it is obvious, would only include goods which *were* the felon's, and could not possibly apply to goods *stolen*, and of which the property had not been altered, so that they were *not* the felon's. The right to felons' goods arose to the crown by virtue of forfeiture, which was part of the effect of a conviction for felony. But forfeiture, it is obvious, can only apply to goods which are the goods of the party against whom the forfeiture has accrued, and it therefore could never apply to goods stolen while in the hands of the *felon*, for in *his* hands the property could not be altered. And even in the hands of an innocent purchaser the property would not be altered, nor the legal right affected, except in case of sale in market overt. Under the above statute, whether the thief had been proscribed by appeal or indictment, restitution was not barred by sale in market overt (2 *Inst.*, 714; *Hale's Pleas of the Crown*, p. 317, b. ii., c. xxiii., s. 54). Still the restitution given by the statute was not of right, but in the discretion of the judge before whom the thief was convicted, and with reference to the particular circumstances of the case, and the owner was not entitled unless he had used due diligence in the prosecution (*Hawkins' Pleas of the Crown*, p. 318, b. ii., c. xxiii., s. 56). It was said, indeed, by Lord Mansfield, C. J.: "The statute puts an indictment in the same case as a writ of appeal, but leaves the party to his own way of recovery. Since the statute, it gives him a particular remedy, but does not take away his other remedy (*i. e.*, an action of trover). I do not believe there has been a writ of restitution these two hundred years" (*Golightly v. Reynolds, Loft.*, 88-90). But that was because, through the greater efficiency of the modern police, felonies are generally discovered and prosecuted before there has been any sale in market overt, in the absence of which, and while the goods remain in the hands of the felon, the common law right to restitution is clear, the property not having been altered. There is indeed a rule or principle of the common law that a party cannot pursue his civil remedy in a case of felony until he has prosecuted in a criminal suit, and accordingly, in a modern case, the owner failed in an action of trover because the conversion was *before* conviction (*Horwood v. Smith*, 2 *T. R.*, 750). The stat. 21 Henry VIII., c. xi., which restored goods to a prosecutor on conviction of the person who took them away, extended only to a felonious, and not to a fraudulent taking (*Rex v. De Veaux*, 2 *Leach*,

tices of gaol-delivery, or other justices before whom the conviction was, may award writs of restitution, in like manner as in an appeal.

Having thus gone through all the statutes of this king on the offence of larceny and robbery, we shall proceed to examine what new felonies were created. These are of a miscellaneous nature. It was made felony, by stat. 22 Henry VIII., c. 11, to cut down or break up any part of

C. C., 585; 2 *East, P. C.*, 789, 839). The stat. 7 and 8 George IV., c. xxvii., wholly repeals the stat. 4 George I., c. xi., except as to piracy; and stat. 9 George IV., c. xxxi., wholly repeals the stat. 1 George IV., c. cxv. By 7 and 8 George IV., c. xxix., a power of restitution is given where the goods were obtained by any misdemeanor against that act. By the stat. 7 and 8 George IV., c. xxvii., the stat. 21 Henry VIII., c. xi., is wholly repealed. But this is only a rule of procedure, so that in case of conviction or acquittal the right of the owner is as it was before (*Crosby v. Long*, 12 *East*, 409), and it is clear that, excluding the case of sale in market overt, the property reverts in the owner upon conviction. The 7 and 8 George IV., c. xxix., s. 29, provided that if any person guilty of stealing any chattel, money, valuable security, or other property whatever, shall be indicted for any such offence by or on behalf of the owner of the property, and convicted thereof, in such case the property shall be restored to the owner or his representative, and the court before whom any such person shall be convicted shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner. This enactment extended beyond the common law, for it applied to money, and to sales in market overt; but, so far as it applied to cases within the common law, it was cumulative, and left the right of action unaffected. And accordingly, in a case subsequent to that act, the plaintiff recovered in trover, the party there not having recovered in market overt (*Peer v. Humphrey*, 2 *A. and E.*, 495). And it was afterwards held, that under the statute the property in a stolen chattel re-vested in the owner on conviction of the thief, and the owner might maintain trover for it, though there had been no order for restitution (*Scattergood v. Sylvester*, 15 *Q. B. Reps.*, 506). So it was afterwards held that the rule of the common law precluding a civil action for the recovery of the chattels stolen until conviction or at least prosecution, only applies to the original owner, not to a purchaser (*White v. Spettigue*, 12 *M. and W.*). The late criminal law consolidation act as to larceny, etc., (24 and 25 *Vict.*, c. xc., s. 100), contained an enactment on the subject substantially the same, and governed by the same principles. At common law, goods stolen and "waived" could not be recovered unless the thief was convicted (*Fooley's Case*, 5 *Coke*, 109). Before this act, if goods stolen were sold in market overt by the felon, yet there was no restitution, though he was convicted, but since that it has been held otherwise (*Daviler v. Herring*, 11 *Mod. Reps.*, 319). A sale in market overt, however, since this statute, as before, prevented the right to restitution, because it altered the property (*Case of Market Overt*, 5 *Coke's Reps.*, 83). But then market overt, as the phrase, open market, implies, means a place open, public, and set apart for the sale of such articles. And in this sense, and in this sense only, shops in London are held to be market overt (*Ibid.*) But otherwise of sales which are really secret, as behind a curtain or partition, or in a secret separate room, or of articles not ordinarily sold in the shop.

the pow-dike and oldfield dyke in Norfolk and the Isle of Ely; as it was also to sell, exchange, or deliver, any horse, gelding, or mare to a Scotchman, by stat. 23 Henry VIII., c. 16, or into Scotland, or the batable to the use of a Scotchman, was made felony, to be determined by the wardens of the Marches, by stat. 32 Henry VIII., c. 6. It was declared felony, by stat. 31 Henry VIII., c. 2, to fish with nets, hooks, or baits, in any several pond, stew, or moat, with intent to steal fish (*a*), from six in the evening to six in the morning, against the will of the owners; or to break up the head of any such pond, stew, or moat, by day or by night, whereby any fish were taken or destroyed: and fishing in the above manner in the daytime was punished with imprisonment for three months. This

(*a*) Since this time many statutes have passed for the protection of fisheries, as well as of game; and a summary jurisdiction has been given to justices to enforce these enactments, which, however, have been pervaded by one general principle, the protection of clear and undoubted right, without entering summarily into questions, if really in dispute, as to the right. It is to be observed also, that this statute and those in *pari materia* were directed against the offence of poaching, or fishing in private streams or waters, and are to be distinguished from another important series of statutes, commencing with the Great Charter, against encroachments or nuisances in public rivers. Thus there was a statute, in the reign of Elizabeth, against improper modes of fishing in public rivers. The present statute related to private waters; and there was a similar statute, the 22 Charles II., c. xxv., against taking fish in any river (*i. e.*, not public) without the consent of the owner. This was aimed against poaching, and was followed by the act 5 Elizabeth, c. xxi., and 22 Charles II., c. xxv., enacting that no person shall take any fish in a river without the consent of the owner. More modern acts, the 9 George I., related to malicious mischief in breaking down the head or mound of a fish-pond. The breaking down the head or mound of a fish-pond was not a felony within stat. 9 George I., c. xxii., if it appeared to have been the object of the offenders to steal the fish, and not to let them escape through the breach in the mound; and if it were, stat. 5 George III., c. xiv., had virtually repealed it as to this offence (*Rex v. Ross, R. & R. C. C.*, 10; 2 *East, P. C.*, 1067); for the act 9 George I., c. xxii., applied only to cases of wanton malicious mischief in cutting the mound or head (*Ibid.*). The principal modern statute on the subject of taking fish was the 5 George III., c. xiv., s. 1, for stealing fish out of a river running through an enclosed park (*Rex v. Carradice, R. & R. C. C.*, 206). The offence was not a felony, nor so declared by the act (*Ibid.*). There might be an indictment on 5 George III., c. xiv., s. 1, for entering an inclosed park, and taking fish bred, kept, and preserved there, in a river running through the park (*Ibid.*). The stat. 7 and 8 George IV., c. xxvii., wholly repeals the stat. 31 Henry VIII., c. ii., 5 Elizabeth, c. xxi., 5 George III., c. xiv.; and also repeals 4 William & Mary, c. xxiii., 22 and 23 Charles II., c. xxv., so far as they relate to this subject (7 and 8 *Geo. IV.*, c. lix., s. 34). These statutes are superseded by more recent enactments, but the general principles of the older acts have been preserved.

was the first law which laid the penalty of felony upon any trespasses respecting fish.

Penal restrictions to protect these objects of diversion and pleasure, where the royal amusements were concerned, were carried further by another chapter of this same statute;¹ the latter branch of which act deserves particular notice, because it seems to have furnished the provisions which were afterwards revived in the famous Black Act^(a)² of modern times, and was itself framed upon the policy of one made in the last reign.³ The following facts were made felony: To take in the king's grounds any egg or bird of a falcon, goshawk, or laner, out of the nest (which had been punished with a year's imprisonment by stat. 11 Henry VII., c. 17); to find or take up any falcon, gerfalcon, jerkin, sacer or sacerit, goshawk, laner or lanerite, of the king's, and having on it the king's arms and verveles, and not to bring or send it within twelve days to the master of the king's hawks. Then follow the provisions concerning parks. To enter into any forest, chase, or park

(a) The act of this reign was followed by 22 Charles II., c. vii.; but the principal act on the subject was the 9 George I., c. xxii., the Black Act, which applied to malicious maiming of cattle, and made it capital. The stat. 9 George I., c. xxii., was designed to extend, and not abridge, the offences described in 22 and 23 Charles II., c. vii.; and therefore horses, mares, geldings, and colts were included in the word "cattle" (*Rex v. Patty*, 2 East, P. C., 1074; 1 Leach, C. C., 72; 2 W. Black, 721; S. P. Rex v. Magle, 2 East, P. C., 1076; *Rex v. Mott*, 2 East, P. C., 1075; 1 Leach, C. C., 73, n.). The act of maiming cattle, to make it a capital offence within the meaning of 9 George I., c. xxii., must have proceeded from a malicious motive towards the owner (*Rex v. Shepherd*, 1 Leach, C. C., 539; 2 East, P. C., 1073). To constitute the offence of maliciously maiming cattle, under the Black Act, it must appear that the maiming was committed from a malicious motive to the owner of the cattle (*Rex v. Pearce*, 1 Leach, C. C., 527; 2 East, P. C., 1072; S. P. Rex v. Kean, 2 East, P. C., 1073; 1 Leach, C. C., 527, n.); and there must have been malice proved against the owner of the cattle, and not against a servant or relation of the owner (*Rex v. Austen*, R. & R. C. C., 490). But it was not necessary to prove a previous existing malice against the owner (*Rex v. Ranger*, 2 East, P. C., 1074). Malice against the owner is not material under 7 and 8 George IV., c. xxx., s. 16. The stat. 7 George IV., c. xxvii., wholly repeals the stat. 37 Henry VIII., c. vi.; 22 and 23 Charles II., c. vii.; 9 George I., c. xxii. (the Black Act); and also 4 George IV., c. liv., except as to threatening letters. The stat. 7 and 8 George IV., c. xxvii., wholly repealed the stats. 37 Henry VIII., c. vi.; 43 Elizabeth, c. vii.; 15 Charles II., c. ii.; 22 and 23 Charles II., c. vii.; 1 George I., c. xlviii.; 6 George I., c. xvi.; 4 George III., c. xxxi.; 6 George III., c. xlviii.; 9 George III., c. xli.; and 46 George III., c. lxvii. To bring the cutting down of trees within the 9 George I., c. xxii., the act must have been done from malice against the owner (2 East, P. C., 1062).

¹ Ch. 12.

² Stat. 9 Geo. I.

³ Vide c. xxvii.

of the king, queen, prince, or any of the king's children, or into any other ground of theirs, inclosed with a wall or pale, ordained for the keeping of deer (*a*), between the rising and setting of the sun, with the face hid, or covered with a hood or visor, or painted, or otherwise disguised, to the intent not to be known, in order to steal deer, or drive any of them from the forest; or, at any time of the day, with the face hid and disguised, to kill conies within any ground being the king's warren within any of the parks above-mentioned; or in the night to enter into any park, chase, or forest, or warren, of the above description, with intent to steal deer or conies, was made felony.

The stat. 37 Henry VIII., c. 6, contains many penalties for the punishment of persons guilty of various species of malicious mischief (*b*). It was made felony to burn, cut, or destroy any frame of timber prepared for building a house. The penalty of £10 to the king, besides treble damage to the party, was given in the following instances of wilfulness and malice: for cutting the head of any ponds, stews, or pipes of any conduit; burning a cart laden with merchandise, or any heap of wood prepared for mak-

(*a*) There were several modern statutes on the subject, 16 George V. and 43 George III., as to killing deer, both of which, with the more ancient statutes on the subject, were repealed by 7 and 8 George IV. The 16 George V., c. xxx., s. 9, authorized the seizing the guns, etc., of persons carrying them into the grounds where deer are usually kept, with intent to destroy them, and makes the beating or wounding the keepers, etc., in the due execution of their offices, felony (*Rex v. Amey, R. & R. C. C.*, 500). An indictment for an offence against 42 George III., c. cvii., was for killing deer (*Rex v. Allen, R. & R. C. C.*, 513). So an indictment under the stat. 7 and 8 George IV., c. xxix., s. 26, was for killing a deer (*Rex v. Weale, 5 C. & P.*, 135). Then there were other statutes applying to all game. Thus, on 57 George III., c. xc., a party would be charged with having entered into a forest, chase, etc., with intent to destroy game, and being found armed in the night (*Rex v. Ridley, R. & R. C. C.*, 515). And a person convicted under 57 George III., c. xc., of being found armed in the night in a forest, chase, park, wood, or plantation, might have been sentenced to hard labor with imprisonment, by 3 George IV., c. cxiv., for all those places are either open or enclosed ground (*Rex v. Parkhurst, R. & R. C. C.*, 503). On an indictment under 57 George III., c. xc., a man might have been convicted of having entered a wood, and of being found armed there, though he was not seen in such wood. It was sufficient if there were evidence to show that he had been there armed (*Rex v. Worker, R. & M. C. C. R.*, 165). By the 9 George IV., c. lxi., the 57 George III. was wholly repealed, but similar enactments were substituted (*Rex v. Nash, R. & R. C. C.*, 386; 1 *Russ. C. & M.*, 418).

(*b*) Superseded by more modern statutes, especially 7 and 8 George IV., c. xxx.

ing coals, billets, or talwood; the barking of fruit-trees; the cutting out the tongue of any beast; or cutting off the ear of any subject, otherwise than by authority of law, chance-medley, sudden affray, or adventure; some of which enormities have been punished in different manners by later statutes.

Among the number of misdemeanors for which various kinds of penalties were ordained in this reign, besides those just mentioned, such only as make the subject of the following three statutes can deserve a place in this historical view of our laws: these are, stat. 22 Henry VIII., c. 10, of Egyptians; stat. 32 Henry VIII., c. 9, of selling pretended titles, and embracery of jurors; and stat. 33 Henry VIII., c. 1, of cheating with privy tokens; with others concerning unlawful games and shooting.

The first of these laws describes that set of people who were then new-comers in this country, as Law against gypsies. "outlandish persons calling themselves Egyptians, using no craft or feat of merchandise, who come into this realm and go from shire to shire and place to place in great company, and used great subtle and crafty means to deceive the people, bearing them in hand, that they by palmistry could tell men's and women's fortunes; and thus many times by craft and subtilty had deceived the people of their money, and also had committed many heinous felonies and robberies." This was the description given of these wanderers. It was now enacted, that if any such persons came within the realm, they should forfeit all their goods and chattels, and should leave the kingdom within fifteen days after command so to do, upon pain of imprisonment. All sheriffs and justices of the peace were empowered to seize their property for the king's use. If they were to be tried for any felony, they were not to be entitled to the privilege of stat. 8 Henry VI., which gave a jury *de¹ medietate lingue*. As to all those then within the realm, they had sixteen days to depart; and if they overstayed that time, they were to be imprisoned, and forfeit all their goods and chattels.

The stat. 32 Henry VIII., c. 9, states the inconveniences which ensued from maintenance, embracery, champerty, subornation of witnesses, sinister labor, buying of titles

¹ *Vide* vol. iii.

and pretended rights of persons not being in possession (a). It enacts, that all former laws against maintenance, cham-

(a) Maintenance is when a man maintains a suit or quarrel to the disturbance or hindrance of right (*Co. Litt.*, 368 b), and therefore it will not be maintenance in any one who unlawfully (*i. e.*, without lawful cause) sustains or supports a plaintiff or defendant in a cause by word or writing, countenance or deed (2 *Inst.*, 208; *Law Dig.*, *Maintenance*). If he who maintains another is to have by agreement part of the land or debt, it is called champerty (*Co. Litt.*, 38 b; *Law. Dig.*, *Maintenance*; 2 *Inst.*, 208). It is barratry not merely if the attorney instigates the suit, but is the only party who desires an interest in it. Thus the stat. 33 Edward I., fol. 2, "Champersters be they who move pleas or suits, or cause them to be moved by their own procurement or by others, and sue at their proper costs to have part of the land in variance, or part of the gains. Hence also the statute of 22 Henry VIII. Notwithstanding this statute, it was held in the reign of Elizabeth, that a contract in consideration of assigning alleged right to land was valid, though it did not appear that either of the parties were in possession. That, however, was in the declaration; on which it did not appear that the plaintiff was not in possession according to the statute, and it was not held that if it had appeared by plea that he was not so, that the case would not have been within the act. The declaration only stated that the plaintiff claimed to have a title to certain land; that the defendant, in consideration that the plaintiff promised to assign her right, title, and interest to the defendant, promised to pay her £40; and the defendant only denied the contract, and did not set up the statute; and after verdict, he sought to do so, and urged that it did not appear that the plaintiff was in possession, but the court said it did not appear that he was not" (*Dobbin's Case*, *Cro. Eliz.*, 151). What was really prohibited by this statute was the sale of a supposed right to that which was held by another; that is, in fact, a sale of a right of action. It was directed to prevent the sale of pretended titles. It does not apply to a sale conditionally upon the party acquiring a title. The description of maintenance given in *Co. Litt.*, 368, does not apply in such a case. No doubt it was said that the statute should be construed literally, and according to its intention, "seeing it is very beneficial to the public weal, things which are out of the letter shall be taken within the equity of it; and if the words of it are obscure, they should, for the same reason, be expounded most strongly for the public good" (*Partridge v. Strange*, *Plowd.*, 77). And Lord Eldon, in a modern case, recognized the propriety of construing the statute according to its spirit and policy, and not its letter (*Cholmondly v. Chorton*, 4 *Bligh*, 43). But cases are common in which courts of equity have sanctioned agreements between relatives or others expecting to inherit property, that it shall be equally shared (*Bechley v. Newland*; 2 *Peece Williams*, 182; *Harwood v. Tuck*, 2 *Sim.*, 192; *Hyde v. Whyte*, 9 *Sim.*, 524). In a modern case, the principle of the law was thus ably and clearly expounded by a great judge: "It is a rule, not of our law alone, but of that of all countries, that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance by champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." He adds: "There are many cases where the acts charged may not amount precisely to maintenance or champerty, yet of which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice" (*Prosser v. Edmunds*, *Y. and Coll.*, *Exch. Eq. Reps.*, 481-497). But where the party does not pretend to any title, nor contemplate any, except such as he may law-

perty, and embracery, shall continue in force, and be put in execution; and it moreover enacts, that no one shall bargain, buy, or sell any pretended rights or titles in lands or tenements; and if any such bargain, sale, promise, covenant, or grant be made, and the seller has not himself nor his ancestors been in possession of the same, or of the reversion or remainder, or taken the rents or profits, for one whole year next before the sale, both buyer and seller shall forfeit the whole value of the land, half to the king, and half to the person who sues for it. A proviso was added, allowing persons in possession, by taking the yearly profits, to buy any pretended title or right of any other person. Maintenance of any suit, embracery of jurors, of subornation of witnesses, are severally punished, in addition to the penalty of former statutes, with a forfeiture of £10, half to the king and half to the party suing, which must be within a year. The buying of pretended titles had grown more frequent since uses had become so common, and thus gave occasion to this statute.

Cheating was at common law an offence punishable by fine, imprisonment, and pillory. Some new provisions are made by stat. 33 Henry VIII., c. 1, respecting one species of it (*a*). This statute ordains, that

Cheating by false
tokens.

fully acquire, the case is not within the statute, either in its terms or its spirit (*Cook v. Field*; 15 *Q. B., Reps.*, 470.) Champerty is where a party not willing to litigate a right conveys to some person who is (*Wightman, J., ibid.*). The common law and the statute were fully expounded in another recent case (*Doe v. William Evans*, 1 *Q. B. Reps.*, 717); and it appears that what was prohibited was the sale of a supposed right to something, that is, the sale of a right of action. The doctrine of maintenance has been applied in several recent cases, both at law and equity (*Pechell v. Watson*, 8 *M. & W.*, 69). The essence of the common-law offence of maintenance consists in the criminal intention with which the act is done; so that when several persons, against all of whom a general claim is put forward by a third party, enter into an agreement to uphold each other in resisting that claim, it is not an act of maintenance if they did so under the *bond fide*, though erroneous, belief, that they were uniting in the defence of a common interest (*Findon v. Parker*, 11 *M. & W.*, 675). It was there said, a landlord may assist his tenant in resisting a claim of tithes in kind, without rendering himself guilty of maintenance. If a man walking in the street were to see a poor person very much oppressed and abused, and without any power of redress, and were to furnish that poor person with money to enable him to procure the assistance of an attorney, in order to have his wrongs righted, and doing so without any intention of oppressing others, or stirring up litigation, he would not be guilty of maintenance (*Ibid.*).

(*a*) This statute, the original of the acts as to false pretences, was superseded by the 30 George II., c. xxiv., which, however, applied only to money or goods; and to have constituted an offence within the 30 George II., c.

if any one falsely and deceitfully obtain, or get into his hands or possession, any money, goods, chattels, or other things of another person, by color and means of any false token, or counterfeit letter made in another man's name (a), and shall be convicted thereof by witnesses before the

xxiv., money or goods must have been obtained by a false pretence with an intention to defraud; but the pretence might have related to a future transaction (*Rex v. Young*, 1 *Leach*, C. C., 505; 2 *East*, P. C., 828, 833; 3 *T. R.*, 98). Bank-notes were not money, goods, wares, etc., within the meaning of 30 George II., c. xxiv. (*Rex v. Hill*, R. & R. C. C., 190). But by the 7 and 8 George IV., c. xxix., s. 53, extended, 30 George II., c. xxiv., to persons obtaining, by false pretences, any valuable security. Obtaining the goods of a tradesman under a false pretence of being sent for them to show a customer is fraud, and not felony (*Rex v. Cockwaine*, 1 *Leach*, C. C., 498). There might be a sufficient false pretence within 30 George II., c. xxiv., by the acts and conduct of the party, without any verbal representations of a false and fraudulent nature (*Rex v. Freeth*, R. & R. C. C., 127). A pretence that a person would do an act which he did not mean to do (as a pretence to pay for goods on delivery), was not a false pretence within the 30 George II., c. xxiv., s. 1 (*Rex v. Goodhall*, R. & R. C. C., 461; 2 *Russ. C. & M.*, 300). If the owner of goods had been induced to part with them by a fraudulent representation, it was not felony in the person so obtaining them (*Rex v. Adams*, R. & R. C. C., 225; 2 *Russ. C. & M.*, 160). If there was a plan to cheat a man of his property, under color of a bet, and he part with the possession only to deposit a stake with one of the confederates, the taking by such confederates would be felonious (*Rex v. Robson*, R. & R. C. C., 413; 2 *Russ. C. & M.*, 123). To obtain property from another by the practice of ring-dropping was felony, if the jury found it was obtained under a preconceived design to steal it (*Rex v. Patch*, 1 *Leach*, C. C., 238; 2 *East*, P. C., 678; *S. P. Rex v. Marsh*, 1 *Leach*, C. C., 345). It was a false pretence if a carrier obtain the carriage-money by pretending to have delivered the goods and lost the bailee's receipt for them (*Rex v. Airey*, 2 *East*, P. C., 831; 2 *East*, 30). The stat. 7 and 8 George IV. wholly repeals the stat. 33 Henry VIII., c. i., and 52 George III., c. lxiv.; and also repeals so much of the stat. 30 George II., c. xxiv., as relates to this subject; and so much of the hard-labor act, 3 George IV., c. cxiv., as relates to hard labor for this offence; but this last is in effect re-enacted in the 7 and 8 George IV., c. xxix. There is a close connection, though at the same time a clear distinction, between the crimes of forgery and false pretences. Every forgery is a false pretence in a certain sense, but a false pretence is not necessarily a forgery, and is indeed very distinct therefrom.

(a) The old statutes on the subject of forgery related to deeds. These and other more ancient statutes on the subject were superseded by the 7 George II., c. xxii., and c. xxv., which made forgery of notes for payment of money in warrants or orders for the delivery of goods, etc., a capital offence, but only applied when the forgery was in the name of the person who had authority to order the delivery, and not therefore to order in the name of customer (*Rex v. Mitchell*, 2 *East*, P. C., 936; *Rex v. Williams*, 1 *Leach*, C. C., 114; 2 *East*, P. C., 937). These acts, however, were repealed by 11 George IV. and 1 William IV., c. xi., which remedied these and other defects; and while the penalty was mitigated, the offence was extended to almost any forgery of an instrument or writing, by means of which money or anything of value was obtainable. If, however, the money or goods are obtained, not by virtue of an assumed order or warrant, but on the faith of a representation in the writing, then it is a false pretence, not a forgery.

chancellor, or by examination of witnesses, or confession in the Star Chamber, or before the justices of assize of the peace, or by action in any court of record, he shall suffer any corporal pain (except death) which shall be adjudged. It should seem that no alteration was made by this statute in the offence, which remains as at common law; only the jurisdiction over it was extended, and the power of punishing enlarged. Justices of assize and of the peace are authorized by process, or otherwise, to cause persons suspected of this offence to be taken and kept till the assizes or sessions.

Among the penal laws of this king we find some restrictions imposed upon certain diversions with a more strict hand than the legislature had applied in any former time. Gaming and the killing of game were the objects of several acts of parliament. The two acts that aimed directly at the latter were intended rather for repressing the depredations of those who have since been called poachers,¹ than to circumscribe the amusement of the sportsmen. By stat. 14 and 15 Henry VIII., c. 10, no person, of whatsoever estate, degree, or condition, was to trace, destroy, or kill any hare in the snow; justices of peace in their sessions, and stewards of leets, had authority to inquire of such offenders, and to fine them 6s. 8d. for every hare killed. The stat. 25 Henry VIII., c. 11, was for the protection of wild-fowl, which used to be taken while the old were moulting, and while the young were not able to fly. To prevent this, it was ordained, that between the last day of May and of August, none should take wild-fowl in nets, or other engines, on pain of a year's imprisonment, and fourpence fine for every fowl, to be inquired of by justices of the peace. There was a proviso, that any gentleman, or other who can spend forty shillings per annum of freehold, might hunt and take them with spaniels, without using any net or engine, except it was a long-bow (*a*). There were penalties also on those who took their eggs.

(*a*) Since this time, and in our own age, statutes have passed with the two-fold object of imposing a qualification for sporting, and of protecting the right of sporting. The game act, 1 and 2 William IV., c. xxxii., requires certificates to qualify a person for sporting, and gives magistrates summary power of convicting summarily for unlawful sporting or pursuit of game.

¹ *Vide ante*.

This exception in favor of the long-bow was in the same spirit which the legislature manifested in the last reign and in this, by several provisions made before and after this act. This martial weapon, which the English archers were so famous for managing, had lately been going out of repute, and cross-bows and hand-guns were now the fashionable instrument, whether for diversion or use. These new-invented weapons, from their commodious form, had been applied to the destruction of game, which was an additional reason for endeavoring to discourage them, and to bring the long-bow again into vogue. To effect this, several acts were made, which, by a side-wind, became in effect so many game-laws. In the preamble of stat. 19 Henry VII., c. 4, the unlawful application of the cross-bow to kill the king's deer, and the universal disinclination to use the long-bow, that had made us once so formidable to our enemies, is very strongly and feelingly stated; and it is there enacted, that no person, without the king's special license, under his placard, signed and sealed with his privy-seal or signet, should occupy or shoot in any cross-bow (unless he shot out of a house for defence thereof), except he be a lord, or have lands of freehold of two hundred marks per annum, on pain of forfeiting it, with its apparel, to any person who would take it. By stat. 3 Henry VIII., c. 13, the qualification was raised to three hundred marks, and all licenses granted before that act are declared void. Hitherto the statutes were confined to cross-bows; but stat. 6 Henry VIII., c. 13, prohibited shooting either in cross-bows or hand-guns, which latter, probably, were just come into fashion; besides forfeiture of the instrument, there was a penalty of £10; no man was to keep such instruments in his house on pain of imprisonment, and a penalty of £10. All placards were declared void, and the offence was to be examined before

The construction of this statute, however, has been pervaded by the general principle applicable to all such statutes, that they are for the protection of undoubted right, not the determination of questions of disputed right. By that statute it is provided, "that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass." And if at the hearing before the justices, a *bond fide* claim of title to the land is set up on behalf of the defendants, the proviso in stat. 1 and 2 William IV., c. xxxii., s. 30, does not give justices jurisdiction, upon a charge of trespass in pursuit of game, to determine a claim to title of land against the wish of the defendants (*Reg v. Cridland*, 7 E. & B., 853; 27 L. J., 124, Q. B.; 3 Jur., 1213).

the council, as well as before justices of the peace. By stat. 14 and 15 Henry VIII., c. 7, the qualification was lessened to £100 per annum in a man's own right, or the right of his wife; and the penalty was lowered to forty shillings. All placards were declared void. Some small variation was made in this regulation by stat. 25 Henry VIII., c. 17. This, like the former acts, declared void all former placards.

These were followed by statute 33 Henry VIII., c. 6, which repealed all the former laws, and is the principal act upon this subject. The chief regulations of this act were these: the prohibited instruments here mentioned are the cross-bow, hand-gun, hagbut, or demihake; and they were not to be used or kept under penalty of £10, unless by a person having £100 per annum (*a*). But hand-

(*a*) Upon this statute arose the first case upon that most important question, which from that time to the present has been the subject of constant doubt, How far the court of king's bench, on *certiorari*, *habeas corpus*, or otherwise, can examine into a summary conviction by a magistrate? In that case, a sheriff-bailiff, going to arrest St. John of Bedfordshire, because he feared resistance, brought with him a dagge, a sort of firearm, and St. John, who was a justice of the peace, being apprised of this, sent a constable to arrest him, and bring him before him; and upon "examination of the matter," convicted him, and committed him for non-payment of the fine. Somehow or other it is not said how the matter came into the king's bench; and it was objected that a dagge was not within the act; but it was resolved that it was. But it was resolved, for another cause, that the carrying of the dagge was not prohibited by the act; for the sheriff or any of his ministers, for the better execution of justice, may carry with them hand-guns or any other weapons, and the same was not restrained by the general prohibition of the act. And (though this is all that is stated) it is to be inferred that the conviction was in some way set aside or got rid of (*St. John's Case, Coke's Rep.*, 72). Now, it is manifest from this case, that the court of king's bench considered it clearly had jurisdiction to enter into the case on its merits — not, indeed, to enter into any disputed question of fact, but into any mixed question of law and fact arising upon admitted facts; as, for instance, whether the dagge was a weapon within the act; and, still more, into any question of law arising on the facts: as, whether the carrying of it by a sheriff-officer was within the mischief or spirit of the act, as it was within its letter and its terms. And it is conceived that this was most clearly good law, and that all subsequent decisions contrary thereto are clearly bad law, and have proceeded upon an obvious confusion between a question of disputed fact and a mixed question of law and fact arising upon undisputed facts. For the province of a justice of the peace, in the exercise of their summary jurisdiction under these statutes, is analogous to that of a jury, whose province is only disputed questions of fact — at all events in civil cases; so that it has always been a principle of law, that if the facts are not in dispute, their legal effect is for the court; whence it is that the judge may direct a verdict and enter it if the jury will not give it; and he can be compelled to do this by a bill of exceptions; and, on the other hand, the jury are virtually compella-

guns that were not full a yard in stock and gun, and hagbuts and demihakes not being three-quarters of a yard, were forbid to all persons under pain of £10; and persons having £100 per annum might take such short instruments, or any cross-bows, from persons who had them. This act contains a number of provisions too long to enumerate. Among others one was that all placards should in future be void. Lords and gentlemen, and inhabitants of cities and towns, might shoot at butts or banks with hand-guns of a proper length.

Thus far provision was made for prohibiting the new-

ble, by the tenor of the penal procedure by attain, to return penal verdicts when the judge so far doubted of the law as to be unwilling to direct a verdict, or to return a verdict in deference to his direction if he did direct it. And one of the great uses and objects of a special verdict (as was often said in this reign) was to relieve the jury from this liability. By an obvious analogy, it would be in favor of justices of the peace to review their decisions: and hence, at a later period, it was held in a case where commissioners had adjudged bad wines to be strong waters, that their adjudication was invalid. And Lord Hale said: "The case of a justice of the peace comes fully up to this; for the justice had a jurisdiction, but he kept not within it, and it would be mischievous if the subject in such a case had no remedy" (*Perry v. Huntington, Hardress*, 480). In a still later case, the authority of St. John's case was upheld by Holt C. J. (*Burnaby's Case*, 3 *Salk.*, 217). In that case, on a conviction under a penal statute for cutting trees, it was insisted, upon *certiora*, that the case did not really come within the act, as the defendant was a gentleman of property, and claimed title, and the provision of the act was wilful mischief by mean people. The court said, that if the matter was within the jurisdiction of the magistrates, their decision could not be questioned; but Holt C. J., said it must have been done in St. John's case; for otherwise the point as to the "dagge" could not have arisen. However, the conviction was reversed for a mere formal cause; and this was the beginning of a series of pestilential decisions, setting aside convictions for mere formal flaws, and refusing to disturb them though flagrant violations of the spirit of the law. But as Salkeld: *quare* if the justice proceeds without ground, and makes a good order?—for the king's bench is not judge of the fact, but of the case upon the fact (1 *Salk.*, 181). This it is conceived, is the true principle; and if so, then the king's bench, when the facts are not in dispute, should adjudge upon the merits. Whenever an act of parliament creates an offence, and is silent on the manner of trying it, it shall be understood to be a trial by jury, according to Magna Charta (*Rex v. Sturney*, 7 *Mod.* 99). Proof allowable by common law is verdict by twelve men (*Constable's Case, Coke's Reps.*, 108). So in every contract conditioned for proof, without excluding trial by jury that shall be implied, and proof be in an action; for as it is limited to proof generally, it ought to be by jury, which is, by the law of the land, the proper trial of things in controversy between men (*Trover, Sed.*, 57; *Oliver Webb v. Bracton*, 2 *Sed.* 48; *Gilpin's Case, Morr.*, 845). The most sufficient proof in law is by a jury (*Perhues*, s. 791; *Butcher v. Vale*, 1 *Sed.*, 313). Where, however, a statute, 33 Henry VIII., c. vi., provides that a matter shall be in due examination and proof before a justice of the peace, that means trial, not by a jury, but by the justices, on proof (*Anon. Vent.*, 33).

invented weapons. Meantime, the legislature did not neglect to make regulations for encouraging the exercise of the long-bow. As the former course of acts had an eye to the unlawful destruction of the game, the latter kept in view the many unlawful games in which the people indulged themselves in preference to that of shooting in the long-bow: so that as the former were a species of game laws, the latter were acts against gaming. The first of these acts was statute 3 Henry VIII., c. 3, which act was made perpetual, and the policy of it pursued by statute 6 Henry VIII., c. 2; but both these were repealed by statute 33 Henry VIII., c. 9. This act is still in force, and, as it contains more general and effective provisions than any later statute for suppressing public gaming-houses, it is particularly worthy of notice.

This act purports to be made in consequence of the complaint and petition of the bowyers, fletchers, stringers, and arrow-head makers; and it enacted that every person, not being lame or decrepid, within the age of sixty (except spiritual persons, the judge and justices of assize), should use and exercise shooting in long-bows, and have a bow and arrows continually in his house for that purpose. Fathers and governors of those of tender age were to teach them to shoot, having for every male child of seven years old in his house, till he was seventeen, a bow and two shafts, to induce him to learn. Where such young people were servants, there masters were to abate out of their wages the price of such bow and arrows. After seventeen years, such young persons were to provide themselves with a bow and four arrows. If any father or master of a family, or servant, failed herein, he was to forfeit six shillings and eightpence. These provisions are followed by several about building butts, the prices of yew, and other bows; and all breaches of these regulations were made cognizable by the justices in sessions and stewards in their leets.

These are followed by the regulations about unlawful games, which are as follows: No person, by himself or his servants, or other person, for his gain, livery, or living, was to keep, have, hold, occupy, exercise, or maintain any common house, alley, or place of bowling, coyting, cloysh-cayls, half-bowl, tennis, dicing-table, or carding, or any other manner of game prohibited by any

statute heretofore made, or any other unlawful game hereafter to be invented, on pain of forfeiting, for every day of keeping such place, or suffering such game, forty shillings; and every person using and haunting such houses and plays, and there playing, for every time six shillings and eightpence. Every placard to keep a common gaming-house contrary to this act, was to specify the game and the persons to play at it, or was to be void; and persons obtaining such placard, before they put it into execution, were to find sureties not to use the placard contrary to this statute: but these placards were declared void by a subsequent statute.¹ Justices, mayors, and other head officers are authorized to enter into houses where games are suspected to be exercised contrary to this act, and to arrest the keepers and persons there resorting, and keep them in prison till they respectively find sureties not again to offend. Such head officers are directed to make search weekly, or, at furthest, once a month, for such houses; and if they neglected for a month, they were to forfeit forty shillings. No artificer, husbandman, apprentice, journeyman, laborer, or serving-man, was to play at tables, tennis, dice, cards, bowls, or any other unlawful game out of Christmas, under pain of twenty shillings for every such offence. At Christmas they were only to play in the houses, or in presence of their masters. None, at any time, were to play at ball in open places, out of a garden or orchard, under pain of six shillings and eightpence. All leases of houses where unlawful games were exercised are declared void. There are two provisos to this act; one allowing masters to license their servants to play at cards, dice, or tables, with them, or with any other gentleman, in their master's house or presence; the other allowed any nobleman, or person, having £100 per annum, to license his servants, or family, to play within the precinct of their houses, gardens, or orchards, at cards, dice, tables, bowls, or tennis. All other statutes against unlawful games were repealed, so that this act became the code of law upon this important article of police.

The last penal law made in this reign was for the punishment of an offence which had been encouraged, if not

¹ Stat. 2 and 3 Philip and Mary, c. 9.

occasioned, by the many bloody laws concerning treason which had gone before it; and may be reckoned as one very strong instance of the ill consequences attending a multiplicity of penal laws. Many evil-disposed persons, availing themselves of the then state of things, when almost every public offence was treason, and every treason was infallibly punished as the law directed, had endeavored to bring those whom they disliked under suspicions, by dropping papers conveying accusations of crimes against persons by name. To repress this abominable practice, it was by stat. 37 Henry VIII., c. 10, ordained to be felony without clergy for any person to make, or cause to be made, a writing comprising a charge of treason, and to leave it in an open place where it might be found, unless the party so doing subscribed his name to it, and within twelve days appeared in person before the king or his council, and there affirmed the truth thereof, and did his endeavors to prove it. A provision of this kind was never more necessary than at this period; although the act did not quite discountenance this mode of information, it inflicted a proper punishment on the worst species of it. In punishing with death those who so insidiously endangered the lives of others, this act so far pursued the spirit of our old law, which adjudged to death such perjured persons as, by their false oaths, had effected the conviction and execution of an innocent man.¹

The remaining statutes of this reign which any way affected our criminal jurisprudence are such as were contrived to bend and accommodate the proceedings at common law, so as to facilitate the trial and insure the punishment of offenders; such as extended the common-law trial to cases which were before cognizable by another rule of determination; such as instituted or altered some new-invented tribunals of criminal justice; and lastly, those that deprived many offenders of the benefit of clergy and sanctuary.

The first act that made any change in the course of criminal prosecutions is stat. 3 Henry VIII., c. 12. Complaint had been made that sheriffs and other officers returned jurors for the king, who would readily perjure themselves for corrupt purposes. To remedy this, power

¹ *Vide* vol. ii., c. xi.

was given to justices of gaol-delivery, and of the peace, to reform the panel, by putting in and taking out of names: this was confined to juries that were to inquire for the king. The next was stat. 4 Henry VIII., c. 2, which has been before mentioned as taking away clergy from certain offences. The second clause of that act was pointed against an abuse of the plea of sanctuary, when felons used to allege that they had been taken out of a privileged place in some foreign county, in order to delay the trial, which by law ought to be in such alleged county. To prevent this, it was ordained by this act, that such foreign pleas should be tried by the jury of the county that was to try the felony. This act was temporary, and having expired by the meeting of a new parliament in the 7th of the king, was revived and made perpetual by stat. 22 Henry VIII., c. 2. Another device to elude justice was, for murderers and felons, upon untrue suggestions, to remove themselves and their indictments before the king's bench, which could not afterwards remit them into the county, till stat. 6 Henry VIII., c. 6, gave the court that authority to remand both, and to command the justices of gaol-delivery, of the peace, or other, as the case might be, to proceed thereon. By stat. 23 Henry VIII., c. 13, the challenge of a juror, in trials of murder and felony in cities and towns corporate, for want of freehold, was taken away.

After so far deviating from the old rule which governed trials as to make an *incidental circumstance* triable in a foreign county, the parliament ventured further, and made *offences* committed in one county and place triable in another. To remedy the disorders following from the relaxed state of the judicial economy in Wales and its marches, it was enacted, as has been related, by stat. 26 Henry VIII., c. 6, among other regulations for the reformation of judicature there, that coiners and felons within any lordship marcher of Wales should be tried in the next English county; and when these lordships were divided into counties by stat. 34 and 35 Henry VIII., c. 26, it was declared¹ that this provision should still continue in force. In the meantime, it had been enacted by stat. 32 Henry VIII., c. 4, that all trea-

Trial of treason
committed in
Wales;

¹ Sect. 85.

sons, and misprisions of treason, committed within the principality of Wales and its marches, or wheresoever the king's writ runneth not, should be tried by a commission of *oyer and terminer wheresoever* the king shall appoint.

The policy of trying treasons in *any* county that the king should please to appoint had been first ^{and committed out of the realm.} begun by stat. 26 Henry VIII., c. 13, which enacted, that any offence *made treason by that act, or that was before* held treason, committed out of the limits of the realm *in any outward parties*, shall be inquired of *in such county* of the realm, and before such persons as it should please the king to appoint by commission; and to enforce this new method of proceeding, it was also enacted that process of outlawry against offenders in treason being resident out of the realm, or in any parts beyond the seas, at the time of the outlawry pronounced, should be as good and valid as if they were within the kingdom at the time. The provision of this act was extended by stat. 35 Henry VIII., c. 2 (*a*), to offences *hereafter to be made* or declared treason, misprision, or concealment of treason; and it was added also by this last statute that peers should, notwithstanding, be tried by their peers in this case, as well as in others, lest the novelty of this proceeding, enacted generally, should be considered as so far excluding peers from their common law trial.

We here see the steps the legislature made in the introduction of this novelty of foreign trials. First, coining and felonies committed in Wales and the marches were to be tried in the *next* English county, by stat. 26 Henry VIII. Next, in the same year, it was ordained that treasons committed *out of the realm* might be tried in *any* county. About six years afterwards, it was enacted by stat. 32 Henry VIII. that treasons committed in Wales should be inquired of in *any* county; and now, in the next year, we find two statutes which directed that treasons or murders done *within* the realm might be tried in *any* county the king should please to appoint. The next to

(a) The statute 1 Philip and Mary, c. x., that trials in treason shall be according to the course of the common law, did not take away the force of this stat. 35 Henry VIII., c. ii., for trial of treason committed beyond seas, for that were not triable anywhere at common law. But it took away the force of the stat. 33 Henry VIII. as to trial in a foreign county. But the statute, as it should seem, was only to take away the force of the stat. 5 Edward VI., c. xi., for the two accusers (*Dyer's Reps.*, 33).

these is stat. 33 Henry VIII., c. 20, concerning trials of lunatics who had committed treason, of which we shall say more hereafter. After this is chap. 23 of the same statute, which ordained that any person, being examined before the king's council, or three of them, upon any treason, misprision of treason, or murder, and who confessed the same, or was violently suspected, should be tried by a commission of *oyer and terminer in such shire* as should be appointed by the king. In such trials the challenge of a juror for want of a freehold of forty shillings a year was taken away; and a peremptory challenge was for the future to be allowed *in no case* of high treason or misprision. There was the like saving of the right of peers in this, as had been in the former act.

The statute for the trial of *lunatic* traitors, just alluded to, has more remarkable circumstances in it than those concerning the locality of trial, and is a cruel instance of the anxiety in the government that no offender should by any possibility escape punishment. It directed that if any person was of sound memory when examined before the king's council on a charge of high treason, and after his examination and confession thereof, he should happen to fall to madness or lunacy; yet, if it should appear by the testimony of four of the council that he was at the time of examination of sound memory, a commission of *oyer and terminer* might be issued into *any such shire as the king pleased*, where the offender was to be indicted and arraigned *in his absence*, witnesses heard, verdict found, judgment passed, and the party to be executed thereon, as if the proceeding had been in his presence.

If the simplicity and moderation of our old law was violated by the many new-fangled treasons and other penalties enacted in this reign, the candor of the ancient method of trial was not less destroyed by the extravagant innovation of this statute; nor was that which we mentioned next before very compatible with the original notion upon which the trial by jury was founded.

These last-mentioned statutes, as they took away some of the great advantages derived from the trial by jury, tended to restrain it; unlike that act which made treasons committed out of the realm capable of being tried by a jury in any county, which so far contributed to impart to a new sort of offenders the benefit of this tribunal. The

same may be said of that statute which made *piracy* examinable by a jury in a proceeding at common law. This act was made in the following year, upon the same ideas, and with the same designs.

Trial of pirates.
 There were two statutes made for the trial of pirates and robbers on the sea, stat. 27 Henry VIII., c. 4, and 28 Henry VIII., c. 15, containing the same provisions in every respect, with this only difference, that the former allowed *three* of the commissioners to be a quorum, the latter required *four*. All piracy, theft, robbery, and murder upon the sea were heretofore tried before the admiral, his lieutenant, or commissary, according to the course of the civil law, the nature of which is, says the preamble of the statute, "that before any judgment of death can be given against offenders, either they must plainly confess their offence (which they will never do without torture or pains), or else their offence be so plainly and directly proved by witnesses indifferent, such as saw their offence committed, which could not always be got, either because they murdered those they robbed, or the parties who were present at the fact, being seafaring people, were continually changing place." These are the reasons stated in the act for recurring to a new mode of inquiry. It was therefore ordained that all such offences done upon the sea, or in any haven, river, or creek, where the admiral pretends to have jurisdiction, shall be inquired and determined in such county as shall be limited by the king's commission, as if the offence had been committed on land. These commissions are to be directed to the admiral, his lieutenant, deputy, and three or four such other substantial persons as shall be named by the lord chancellor, authorizing them, or four of them at the least, to hear and determine such offences after the common course of the laws of the realm, in cases of treason, felony, murder, robbery, and confederacies committed upon land, with the same order, process, judgment, and execution; and persons convicted thereby are to suffer such pains of death, loss of land, goods, and chattels, as if they had been attainted and convicted of any treason, felony, or robbery, without benefit of clergy or sanctuary. This statute gives a common law trial in a case which was not before cognizable thereby, but only by the civil law. Piracy still remains an offence by that law, as it was before this statute; but it

is now subject to forfeiture of lands and goods, like a felony. It is not made *felony*, nor has it the properties of felony. There is no corruption of blood, nor are there any accessories before or after the fact, at least as the crime stood upon this act, though alterations to that effect have been made by later statutes;¹ and it has been held that a pardon of all felonies does not pardon piracy.²

As the admiral had, by the common law, cognizance of crimes *on the sea*, the court of the constable and marshal³ heard and determined all offences committed on land out of the realm. Both these courts proceeded according to the civil law; and the new regulations made by these three statutes relating to piracy and treasons done out of the realm, in prescribing these new modes of trial, so far extended the jurisdiction of the common law, and have therefore been held not to be repealed by stat. 1 Philip and Mary, which ordained, that all trials for treason should be according to the due order and course of the common law.

There was a new criminal court erected by stat. 33 Henry VIII., c. 12, to be held before the lord great master,⁴ or lord steward of the king's household, and in their absence, before the treasurer, comptroller, and steward of the Marshalsea, or two of them, whereof the steward of the Marshalsea was to be one. They were to hear and determine all treasons, misprisions of treason, murders, manslaughters, bloodsheds, and malicious strikings by reason whereof blood was shed, within any of the palaces or houses of the king, while he was personally resident there. The inquiry was to be by a jury of yeomen officers in the cheque-roll. The punishment of malicious striking and bloodshed was, that the right hand should be struck off (a); and, "for a declara-

Trial of bloodshed in the palace.

(a) This was actually put in force in the reign of Edward IV., as Dyer mentions in his reports. In our own times it was actually held that under 33 Henry VIII., c. xii., a riot committed in a court of justice, for the purpose of rescuing a prisoner, in the course of which, and in order to accom-

¹ Stat. William III. and George II. ² 3 Inst., 112. ³ Vide vol. iii.

⁴ This great officer was a new appointment made by Henry for his favorite, Charles Brandon, Duke of Suffolk. By stat. 32 Henry VIII., c. 39, he was to have all authority that the lord steward of the household had. This act was repealed by stat. 1 Mary, stat. 3, c. 4, and the office of lord steward restored. The title in the statute of Henry VIII. is that of *lord great master of the household, or, grand maister del hostel du Roy*.

tion of the solemn and due circumstance of the execution," as the statute says, it assigns some part in this bloody rite to almost every officer in the household; which is said by the act to have been a ceremony of long time used and accustomed. It probably was so; for the ceremonial seems to outdo even all the exquisiteness of penal legislation which we have before related in this remarkable reign. The act directs, with great precision, that the serjeant-surgeon is to be present to sear the stump when the hand is stricken off; the serjeant of the pantry, to give bread to the offender after the operation; and the serjeant of the cellar, with a pot of red wine to give him to drink; the serjeant of the ewry, with cloths; the yeoman of the chandry, with seared cloths; the master-cook, with a dressing-knife, who is to deliver it to the serjeant of the larder to hold it upright during the execution; the serjeant of the poultry, with a cock to wrap about the stump; the yeoman of the scullery, with a pan of coals to heat the searing-irons; and the serjeant ferror to bring the searing-irons; the groom of the salcery, with vinegar and cold water; and lastly, the serjeant of the wood-yard to bring a block, with a betel, a staple, and cords to bind the hand upon the block till execution is done. This formality, which probably was designed to strike terror into the whole household, and prevent the disorders it was meant to punish, sounds more like the ordinance of some rude people in the infancy of legislation, than the provision of a wise and polished nation. This barbarous judgment, we are informed, was actually executed on Sir Edmund Knivet, at Greenwich, for striking a man, the king then being there. This was in 33 Henry VIII., and probably was a proceeding under this act of parliament.¹ It should be remembered, that this is a different tribunal from that erected by stat. 3 Henry VII., c. 14,² which is to be held before the steward, treasurer, and comptroller, for felony in conspiring the death of the king, any lord, or privy-councillor.

plish the rescue, an assault was committed, subjects the party to the punishment of amputation awarded by the statute (*Rez v. Thanet* (Lord), 1 *East*, P. C., 408). By the stat. 9 George IV., c. xxxi., so much of the stat. 33 Henry VIII., c. xii., as relates to the punishment of manslaughter and of malicious striking, by reason whereof blood shall be shed, is repealed.

¹ Bro. Peine, 16.

² *Vide* c. xxvii.

Other methods of inquiry were contrived in this reign for the determination of offences against certain statutes. These were numerous and various, and yet hardly deserve notice. Among these may be reckoned the following. By stat. 21 Henry VIII., c. 20, an alteration, which has been noticed in another place, was made in the constituent members of the Star Chamber (a). By stat. 31 Henry

(a) The procedure of this formidable tribunal was as entirely arbitrary as its powers and jurisdiction. The parties accused were examined "upon oath," and this advantage of examination was used like a Spanish inquisition, to rack men's consciences, nay, to perplex them by intricate questions, thereby to make contrarieties; and men were examined upon a hundred interrogatories, nay, examined of the whole course of their lives (*Treatise on the Star Chamber*, s. 11). And if they refused to answer, they were liable to be imprisoned, and even to be kept on bread and water, in order to force them to answer (*Ibid.*, s. 10). The sentences of the court also were quite arbitrary. Thus in 10 Henry VIII., Sir Patrick Bellew was committed to the tower for not yielding a possession and restoring goods ordered by the sentence of the court. Sir Richard Corbett was fined five hundred marks, and Lord Zouch £200. Nicholas Fairfax was enjoined under pain of £300, and Robert Morton under pain of £500. These were enormous sums in those days. Let us look at the records of the Star Chamber. In the 2d year of the reign, the Duke of Buckingham came to the bar of the court and desired of the king and his council to be restored to the office of High Constable of England, which was, as he asserted, unjustly taken from him; and he received orders from the court to put his complaint in writing, to which the king's council made an answer, and he was then ordered to reply thereto (*Hudson's Treatise*, s. 6). There is reason to believe that this was the beginning of the troubles of this ill-fated nobleman, who, in a few years more, suffered on the scaffold in order to appease the jealousies which his proud and ambitious spirit had kindled in the breast of an arbitrary and ferocious monarch. This was not the only instance in which he was before the court; his name is mentioned in several places in the course of the treatise, and it is evident that he was obnoxious. This was only, however, one instance out of many of noblemen of the highest rank dealt with by this formidable tribunal. In the 6th year of this reign, the Earl of Northumberland was ordered to answer to a bill in the Star Chamber, and at the bar made a humble confession of all things which were alleged against him, and submitted himself to the king's mercy, and prayed the court to be suitors for him, especially the cardinal and lord chancellor. The defendant, being brought in to answer, had either to deny the fact, or justify or excuse it by reason of some title or provocation, or confess the offence and submit himself to the mercy of the court, which was used in Henry VIII.'s time to be done by men of rank upon the table in their shirts, as was done by Devereux, by Sir William Butler, by Sir Matthew Brian, by Sir John Leigh, and many others. In every case the defendant was examined upon oath. In the 15 Henry VIII., the Bishop of Norwich took his oath; in the 17 Henry VIII., Lord Morley was so examined; in the 11 Henry VIII., Lord Ogle was sworn and confessed his fault. So arbitrary was the court, that men who knew they were innocent often found it safer to pray for pardon. Thus, in the 7 Henry VIII., Sir John Denham pleaded for pardon, with protestations of innocence. So in the 10 Henry VIII., Sir Robert Sheffield submitted himself to the king's mercy, upon his knees upon the table, before the lords. In the 10 Henry

VIII., c. 8, a particular jurisdiction was framed to inquire of those who disobeyed the king's proclamations, which was again qualified by stat. 34 and 35 Henry VIII., c. 23. The trial of this offence was to be in the Star Chamber, before certain great officers of state, enumerated in the first act; but by the latter it was to be before any nine privy-councillors, two of whom were to be the chancellor, treasurer, president, privy-seal, chamberlain, admiral, or a chief-justice. By stat. 31 Henry VIII., c. 14, the act of the six articles, some direction was given for inquiry concerning offences against that act; and this underwent some change by stat. 35 Henry VIII., c. 5. By the former act commissions were to be awarded to the bishop of the diocese, his chancellor, commissary, and others, to inquire of those offences. Justices of the peace also, in their sessions, and stewards of leets, might, by the oaths of twelve men, inquire thereof. By the latter no one was to be put to his trial but upon a presentment or indictment found by twelve men before special commissioners, or justices of the peace, or of oyer and terminer; and

VIII., the Bishop of St. Asaph's was charged with receiving the pope's bull for confirmation before the king's license, and the bishop being put to his choice whether he would stand to his defence or submit himself to the king's mercy, submitted himself at bar and craved pardon (*Treatise*, s. 11). Attachments were issued to arrest any persons, of whatever rank, who did not at once appear to the summons of the court. Thus, in the present reign, attachments were issued to arrest Lord Ogle and the Earl of Northumberland, and a great number of other noblemen. And in the 6th year of this reign an attachment was issued against the Abbot of Peterborough, who was a lord of parliament. Process was served everywhere, even in churches; and in the 2d year of this reign, a man was committed for resisting service of process in church. In the 16th year of the reign, Sir Robert Constable was summoned into this court for taking away one of the king's wards and affiancing her to his son, and he submitted himself on his knees upon the table in the court. So Sir Randal Brereton, in the 8th year, was cited for taking away the king's widow, and made his submission, and begged for mercy. In 8 Henry VIII., one Scott, a justice of the peace for Surrey, was punished for speaking certain words against the lord cardinal; and, in the 7th year, one Lucas, a privy-councillor, was sentenced for the like offence. And in 12 Henry VIII., one Sage was sentenced for raising a false report of the Lord Dacres. In the 2d year of the reign, Sir John Towre was punished for taking part in a riot. All through the reign juries were fined for acquitting persons tried for felony. In the 4th year, a jury of Abingdon were so punished; in the 18th year, a jury of Kent for the like cause. This perhaps was the most dangerous branch of the jurisdiction exercised by the council, as it tended to intimidate juries and prevent them from acquitting persons even when they fairly doubted of their guilt. And probably this practice may account for the monstrous convictions which were obtained by the king whenever he pleased.

these were to be found within one year after the offence committed.

A reign so fruitful as this in penal laws, did not want expedients for putting them in force. To answer this purpose more effectually, the common-law proceedings were varied, commissions of a new sort were framed, and new methods of examinations were devised: all this contributed to introduce much novelty and confusion. Much of this confusion and most of these novelties were removed by the great repealing statutes 1 Edward VI., and 1 Mary, and 1 and 2 Philip and Mary. While these innovations were multiplying, we are pleased to find some regulations respecting the ancient tribunals. It was in conformity with a former statute¹ declared, by stat. 33 Henry VIII., c. 24, that no justice, nor other man learned in the laws of the realm, should exercise the office of justice of assize in the county where he was born or then inhabited. By stat. 33 Henry VIII., c. 10, the justices of the peace were required to divide themselves, two at least, into every hundred, and hold a session for such respective divisions, six weeks before the quarter-session, to inquire of vagabonds, giving of liveries and badges, maintenance, embracery, unlawful games, and other offences, and hear and determine the same. But this six weeks' session was found to be too burdensome, and was repealed by stat. 37 Henry VIII., c. 7, which directed the justices to take cognizance of all those offences at their quarter-sessions.

We now come to consider the alterations made in the law of clergy and sanctuary. The acts upon this head are such as either take those privileges from certain offenders, or such as make any regulation concerning persons who were still to be indulged with them. In order to show the steps by which the legislature advanced in abolishing these ancient exemptions from the process of criminal justice, it will be, perhaps, the clearest method to take a view of them altogether, in the order in which they were passed.

The taking of the benefit of clergy from certain offences had been begun in the last reign, when it was taken from the desertion of soldiers, and from petit treason.² It was thought proper now to

The benefit of
clergy taken
away.

¹ Stat. 8 Rich. II., c. 2. *Vide* vol. iii.

² Stat. 7 Hen. VII., c. 1; stat. 12 Hen. VIII., c. 7. *Vide ante*.

pursue the same course with robbers and murderers, who, says the preamble of the statute, "*bear them bold of their clergy, and live in manner without fear or dread;*" for reformation of which it was enacted, by stat. 4 Henry VIII., c. 2, that all persons committing murder or felony, in any church, chapel, or hallowed place; or who of malice pre-pense rob or murder any person in the king's highway, or rob or murder any person in his house, the owner or dweller of the house, his wife, child, or servant, then being therein and put in fear or dread, such person shall not be admitted to his clergy. There was an exception in favor of those in holy orders. This act was only temporary, in order to try the temper of the people as to such innovations upon the ancient superstition of the realm: it was to last only to the next parliament. The manner in which this statute was received by the clergy will appear from a transaction which we shall relate at length: it will be thence seen with what zeal and what arguments they maintained this claim, even at the period when it was so near its final dissolution: and how far they had weight, even with this absolute monarch, to suspend, for a time, the effect of his resolution to abolish their privileges.

In the 7 Henry VIII., while the parliament was sitting, the Abbot of Winchcome, in his sermon at Paul's Cross, declared to the people, that this act was contrary to the law of God and the liberties of the church; and that all those who were parties to the enacting of it, had incurred the censures of holy church. In support of this declaration, he showed them a decree which pronounced that *tam minores quam majores ordines sunt sacri*; and therefore, that all who had received any kind of orders, were exempt from temporal punishment, *pro causis criminalibus*, before the temporal judge. This critical time for so open an attack on the legislature was probably chosen in order to prevent a revivor of this statute, which, by the terms of its continuance, had now expired. Such conduct was noticed by the king, who, at the instance of several temporal lords, and members of the house of commons, resolved that the point should be fully and solemnly debated before the judges, and the king's temporal council.¹ There was accordingly a meeting held at Blackfriars; and there

¹ *Justices et temporal counseil del roy.* Keilw., 181.

appeared several divines and canonists to argue the matter on both sides, for the king and for the clergy. Upon this argument, it was thought that those who spoke for the temporal power had the advantage, and many pressed that the bishops should be required to use their authority with the abbot, and make him recant what he had preached; but they strenuously declined it; and said, on the contrary, that they were bound by the law of holy church to maintain the abbot's opinion with all their power: and thus the matter rested for some months, without anything decisive being concluded upon. An incident soon happened which revived this question, and brought it once more to issue in a more solemn manner. Doctor Horsey, chancellor to the Bishop of London, had caused one John Hunne to be taken up on a charge of heresy, and had committed him to the Lollards' tower, as it was called, in St. Paul's. Soon afterwards this man was hanging in his chamber; and a suspicion of murder fell upon the gaoler and Doctor Horsey. This was increased by the former taking refuge in the sanctuary at Westminster; and the world was satisfied of the justness of their suspicions, when the coroner's inquest found them both guilty of the murder. Before this verdict was given, the bishops, perceiving what course the affair was likely to take, and foreseeing the consequences it might be productive of, since the late dispute at Blackfriars, thought they would make their ground more sure, by striking the first blow; and therefore they summoned Doctor Standish (who was the principal of those who had argued at the late meeting against the exemption from temporal jurisdiction) to appear before the convocation. Here they objected to him, that he had maintained certain opinions which were contrary to those taught by holy church. The particular articles were exhibited to him in a formal bill by the Archbishop of Canterbury, and were none other than what had been the subject of controversy at Blackfriars. The Doctor, finding that they meant to make this a matter of heresy, applied to the king for protection against the persecution of the clergy, which he had excited only by his zeal for maintaining the temporal authority of the king's courts. The clergy also addressed the king; protested that they did not proceed against this man for anything he had said at the conference in behalf

The question of
clergy debated
before the coun-
cil.

of the king's power, but for doctrines advanced at certain lectures since; and adjured the king, by his coronation oath, and as he would avoid the censures of the church, to assist them in their inquiry. The temporal lords and the judges, with the commons house of parliament, in their turn addressed the king, and pressed him by the like obligation of his coronation oath, to maintain his temporal jurisdiction, and give all assistance to Doctor Standish, who was attacked by the malice of the clergy, for advancing what was the same in effect as he had urged in opposition to the sermon of the abbot; and that the bishops were attempting to establish all the points maintained in that famous discourse. Upon this the king consulted with Doctor Vesey, the dean of the chapel; and it being his opinion, that the making the clergy answer before the temporal judges, as used in this country, was very compatible with the law of God and the liberties of the church, Henry once more called an assembly at Blackfriars, consisting of the judges and all the council, as well those of the spirituality as temporality,¹ and certain persons of the parliament. There the bill against Doctor Standish was read, and the whole matter again fully discussed. The substance of the arguments on both sides, at the former assembly and at this, was as follows:

Those who maintained the exemption of the clergy from temporal jurisdiction in criminal cases, insisted on the papal decree before mentioned. They contended this was express, and all persons who were of the Christian religion were bound to obey it, under pain of a mortal sin, and *therefore*, that the putting of the clergy to answer for offences before the temporal tribunal, was *peccatum in se*. They said, the privilege of clergy was established by the express command of Jesus Christ, in these words, *nolite tangere Christos meos*; and every law of man which militated with this divine command, was damnable in itself; and *therefore*, they again concluded, that bringing clerks before the temporal courts for crimes, was *peccatum in se*. They said, that the temporal judge could no more justify the arraigning his *spiritual father*, than he could justify the arraigning his *natural father*, which would be a breach of God's express commandment, "*Honor thy father*," etc., which

¹ *Tout le conseil del roy spiritual et temporal.* Keilw., 183.

words extend as well to the spiritual as the natural father; and no disobedience of the son in breaking this law could be justified by usage or custom.

To this it was answered, that the stat. 4 Henry VIII., and the arraignment of clerks before the temporal judges, were compatible with the law of God and the liberties of the holy church; and this proceeding had in view the public good of the whole kingdom, which ought to be favored by all laws. As to the papal decree, and that a breach of it was *peccatum in se*, God forbid, said they, that such a conclusion should be made; for there is another degree of equal authority, which requires all bishops to be resident at their cathedrals at every feast of the year, though we see that the greater part of them never comply with it. Besides, this decree was never received in England, and therefore cannot bind here; and the usage, both before and after the making of it, has always been to the contrary. That before the time of St. Austin, marriage was permitted to priests; but then a decree was made to forbid it: and because this decree was received in England, as well as in many other places, therefore it became the law that priests should not marry. But in some parts of the world this law was never received; as among Christians in the East, where priests had always been allowed to marry. In like manner, this decree, never having been received here, was of no binding authority. That the words *nolite tangere Christos meos* were not spoken by our Saviour, but more than a thousand years before his time by David; and that the "*anointed*" there spoken of were the true believers, as contradistinguished from the unbelievers, who at that time were very numerous in Palestine. As to the interpretation put on the fifth commandment, they said, that it would be no breach of it for the son to arraign his natural or spiritual father; and if they should both be convicted, he might commit his spiritual father to the ordinary, and respite judgment against his natural father, and yet be in perfect obedience to the commandment. But admitting, for sake of argument, that the temporal judge could not justify the arraigning his spiritual father, the argument would not hold, nor prove that he might not exercise the like judicial authority over all other clerks; for every clerk is not his spiritual father. However, after all, they said, this commandment

was not to be taken in the literal sense here put upon it; but was to receive a reasonable interpretation according to the subject-matter.

These are stated to be the arguments used by both sides in this famous contest. Upon these the judges gave their opinion; which was, that those of the convocation who had agreed to the citing of Doctor Standish had incurred a *præmunire*. Afterwards, the same persons met at Baynard's Castle, in the presence of the king, when Cardinal Wolsey, in the name of all the clergy, threw himself at the king's feet, and making a humble protestation in maintenance of the clergy's claim to exemption in criminal cases, he conjured the king to suspend his decision till the matter had been determined by the pope. The Archbishop of Canterbury joined in the same prayer. The king said, that they had not answered the arguments

^{The king's determination.} of Doctor Standish; and added with firmness, "By the order and sufferance of God we are king of England; and the kings of England who have gone before us never had any superior but God alone; and therefore know, that we will maintain the right of our crown and temporal jurisdiction, as well in this point as in others, in as ample a manner as our predecessors have done before us. And as to your decrees, we are well assured that you yourselves of the spirituality act in contradiction to the words of many of them, as has been shown you by some of our spiritual counsel on this occasion; and besides that, you interpret your decrees at your pleasure; therefore we will not conform to your will and pleasure more than our progenitors have."

With this peremptory declaration of the king the business concluded. The bishops promised that Doctor Standish should be discharged from the process instituted against him; and Dr. Horsey was so far rescued from temporal authority, that having remained in a kind of free custody in the house of the Archbishop of Canterbury till the popular clamor was somewhat abated, he surrendered himself privately to the court of king's bench; and having pleaded not guilty to the coroner's inquisition, the king's attorney confessed the plea, and he was discharged.¹

¹ Keilw., from 180 b. to 185 b.

The clergy seem, in this instance, not to have lost any part of their wonted felicity in contending with the secular power: they appear to have gained a victory in the decision, however they might have failed in argument. It is probably to be ascribed to the zeal of the clergy displayed on this occasion that a statute, founded on good sense, and so necessary for the public security, was suffered to expire: nor was it till the king had declared hostilities against the whole papal authority, that the parliament ventured again to abridge the privilege of clergy. This was in the twenty-third year of his reign, when clergy was taken from murder and robbery in certain circumstances: but previous to that, two acts were made respecting abjuration and sanctuary, of which it will be necessary first to take notice.

The privilege of sanctuary underwent a like discussion with that of clergy. On the occasion of a claim of this sort, made by the prior of St. John's, the general question of sanctuary was brought before the council, in 11 Henry VIII. The king himself was there present, and expressed a doubt whether it could ever have been the design of our ancient kings and popes, in their grants of sanctuary, to give that privilege in cases of murder and larceny committed out of the sanctuary *sub spe redeundi* all which he judged to be an abuse: he there signified his determination that this privilege should be reduced to the compass of its original design. It seems the Abbot of Westminster, in conjunction with Cardinal Wolsey, had framed an oath to be taken by all sanctuary persons, by which they bound themselves not to commit treason or felony, either within or without the sanctuary, *sub spe redeundi*: there was, however, no sanction to enforce this oath, but such as could be inflicted by the spiritual court for perjury. Most places of sanctuary, therefore, became resorts for felons, debtors, and delinquents of all sorts, where they lived at no small expense upon the plunder of the public.¹

We shall now see what was done by the parliament towards reforming the abuses then complained of. It was endeavored, by stat. 21 Henry VIII., c. 2, to secure the departure out of the kingdom of all abjured persons. It enacted that every person who

Abjuration and
sanctuary.

¹ Keilw., 188, etc.

had taken sanctuary for felony or murder, where he ought by law to abjure, should, after his confession, and before his abjuration, be marked, by order of the coroner, with a hot iron on the brawn of the thumb with the letter A, that he might be known for an abjured person. It was, moreover, provided, that any felon or murderer who ought to abjure, refusing to take his passage as limited by the coroner, should lose the benefit of his sanctuary, and be taken out and committed to prison, to be dealt with according to law. But the banishment of so many abjured persons began now to be thought not the wisest policy; as many able and expert artificers and laborers were thereby furnished to foreign countries. A new method of ordering these abjured persons was struck out by stat. 22 Henry VIII., c. 14, which directed the oath of abjuration to be altered; and that, instead of abjuring the realm as before, such an offender "should abjure from all his *liberty* of this realm, and from his liberal and free habitations, resorts, and passages, to and from the universal places of this realm, which appertained to the liberty of the king's subjects undefamed;" and having made this abjuration, he was to be directed by the coroner to any sanctuary within the realm, which the offender should choose, there to remain as a *sanctuary-person abjured* during his natural life, and to be burnt in the hand, as directed by the former statute. If he came out of such sanctuary, he was to suffer death as an abjured person returning to the kingdom. Such sanctuary-person committing any petit treason, murder, or felony,¹ either in or out of sanctuary, was to lose all benefit of sanctuary. Thus was abjuration put upon a new footing; and such offenders as used to avail themselves of this privilege to escape punishment, were kept hereafter within the reach of the law.

When such provision was made for the due confinement of sanctuary-persons, a like policy was pursued in regard to those entitled to clergy; and that benefit was also taken away in many cases where it was before enjoyed. This was effected by stat. 23 Henry VIII., c. 1 (a), an act which partly had in view

Clergy again
taken from cer-
tain offenders.

(a) Repealed by 7 and 8 George IV., c. xxvii.

¹ *Vide* stat. 33 Hen. VIII., c. 15, the preamble of which gives some idea how sanctuary-persons lived in those privileged places.

the stat. 4 Henry VIII., c. 2. upon which we have just said so much, and partly some former statutes relating to the purgation of clerks-convict. The preamble recites the statute of Westminster 1, stat. 3 Edward I., c. 2, which enjoined bishops not to deliver clerks indicted of felony without due purgation:¹ and stat. 4 Henry IV., c. 2,² which ordained, that persons convicted of treason not against the king's person, and notorious thieves delivered to the ordinary as clerks-convict, should not make purgation, but be safely kept in custody, according to a constitution provincial to be made, but which never was made: since which, the statute complains, it continually happened that persons convicted according to law, and committed to the ordinary, "were delivered for corruption and lucre;" or, "were suffered to make their purgation by such as nothing knew of their misdeeds." To remedy such abuses, it was enacted by this statute in the following manner: In the first place, clergy was taken away from certain offences; and, in the next place, some provisions were made respecting those who were still to enjoy the benefit of clergy; which provisions were calculated to render that benefit less mischievous than it had been. It was enacted, that no person found guilty, after the laws of the land, of petit treason; for wilful murder of malice prepense; for robbing of any church, chapel, or other holy places; for robbing of any persons in their dwelling-houses or dwelling-place, the owner or dweller in the same house, his wife, his children, or servants then being within, and put in fear and dread by the same; or for robbing of any person in or near about the highways; for wilful burning of any dwelling-houses (a) or barns wherein any grain or corn

(a) Burning a mansion-house contiguous to others was a misdemeanor at common law (*Rex v. Probert*, 2 East, P. C., 1030). The feloniously burning of a dwelling-house is arson at common law; but the burning of an out-house is a statutable felony (*Rex v. Nash*, 2 East, P. C., 1021). If a person set fire to a stack, the fire from which is likely to and which does communicate to a barn, which is thereby burnt, the person is indictable for burning the barn (*Rex v. Cooper*, 5 C. & P., 535), and could be indictable at common law if it were a dwelling-house (*Ibid.*). A tenant from year to year was not guilty of arson by burning the house of which he is in possession; but if, by firing his own house, he thereby burns the house of another, he is guilty of the crime (*Rex v. Pedley*, 1 Leach, C. C., 242; *Cald.*, 218; 2 East, P. C., 1026). The stat. 9 George I., c. xxii., did not vary the nature of the crime of arson. (*Rex v. Breeme*, 1 Leach, C. C., 220; 2 East, P. C., 1026; but see stat. 43 George

¹ Vide vol. ii.

² *Ibid.*, vol. iii.

shall happen to be; nor their abettors, procurors, helpers, maintainers, or counsellors, shall be admitted to the benefit of their clergy, except only such as are within holy orders, that is to say, of the orders of subdeacon¹ and above.

As to those in the orders of subdeacon and above, when delivered to the ordinary as clerks-convict of any of the above-mentioned offences, they were in nowise to be suffered to make their purgation, nor to be set at liberty; but to remain in prison during life, except they found two sufficient sureties to be bound for their good abearing. However,² the ordinary, if he pleased, might by this act degrade such clerk-convict, according to the laws of the church; and send him to the king's bench, where judgment of death might be passed on him.

By this statute, a severe blow was given to the benefit of clergy, and to the personal immunity of the clergy in general; for though they were not involved in all the penalty of this act, and their lives were spared when they were guilty of the above offences, yet they were condemned in such cases to perpetual imprisonment, and even to death, if the ordinary so pleased to direct. It was in aid of this act that stat. 23 Henry VIII., c. 11, made it felony, without benefit of clergy or sanctuary, for a clerk-convict to break the prison of the ordinary and escape.

Such a reformation in the punishment of offenders as was made by stat. 23 Henry VIII., c. 1, deserved every attention and support to render it effectual and complete. But this act, from the terms of it, extended only to such persons as were *found guilty* after the due course of the

III., c. lviii.). A building separated from the house by a passage, used as a school-room, but within the curtilage, was an "out-house" within the 9 George I., c. xxii., s. 1, although not of the ordinary description of out-houses (*Rex v. Winter, R. & R. C. C.*, 295). A common gaol is a house within the statute of arson (*Rex v. Donovan, 2 W. Black.*, 682). A prison or common gaol was a house within the meaning of 9 George I., c. xxii. (*Rex v. Donovan, 1 Leach, C. C.*, 69; 2 *East, P. C.*, 1020). A tenant in possession of a copyhold messuage is not guilty of arson by burning it, although it has been surrendered to the use of a mortgagee; for it is not the house of another while the tenant continues in possession (*Rex v. Spalding, 1 Leach, C. C.*, 218; 2 *East, P. C.*, 1025). The stat. 7 and 8 George IV., c. xxvii., wholly repeals the stat. 23 Henry VIII., c. i.; 43 Elizabeth, c. xiii.; 22 and 23 Charles II., c. vii.; 9 George I., c. xxii. (the Black Act); 9 George III., c. xxix., and 52 George III., c. cxxx.; and the stat. 9 George IV., c. xxxi., wholly repeals the stat. 43 George III., c. lviii. (Lord Ellenborough's Act) (*see L.-C.-J. Tindal's charge, 5 C. & P.*, 265 n.).

¹ *Vide ante.*

² Sect. 6.

law; therefore criminals, to prevent their being so found guilty, would stand mute, or by other means prevent a verdict. Again, in cases where a robbery or burglary was committed in one county, and the thing stolen was carried into another, the offender, if found guilty in such *other* county, could not, under this act, be deprived of his clergy; because the jury could not inquire of the robbery or burglary in the first county, but only of the larceny in their own. These defects were remedied by stat. 25 Henry VIII., c. 3, which enacts, that all persons arraigned for any offence mentioned in stat. 23 Henry VIII., c. 1, who shall stand mute of malice or froward mind, or challenge peremptorily above the number of twenty (to which number felons had been confined by a late statute),¹ or will not answer directly to the indictment, shall lose their clergy, in like manner as if they had pleaded and been found guilty. And further, that persons indicted for stealing goods in any county, and found guilty, or who stand mute, challenge, or will not answer as above described, shall lose their clergy, in like manner as if found guilty where the robbery or burglary was committed.

The sixth chapter of the same statute made sodomy felony; or, as the statute expresses it, "the detestable and abominable vice of buggery committed with mankind or beast." This crime, we have before seen, was variously punished by our old law;² but now it was made a common law felony, and those who were convicted thereof by verdict, confession, or outlawry, were to suffer death and forfeiture as felons; and no person *offending in any such offence*, was to be admitted to his clergy; which last words go further than the former statute in describing the persons who shall lose their clergy, unless they are to be considered as restricted by the foregoing, which confines the penalty of death and forfeiture to those convicted by verdict, confession, or outlawry. In the next year an act was made³ to extend the provisions of the famous stat. 23 Henry VIII., c. 1, to Wales.

Clergy was taken from offenders in one or more instances by other statutes. By stat. 27 Henry VIII., c. 17, clergy and sanctuary were taken from servants embezzling their master's goods within stat. 21 Henry VIII., c. 7.

¹ 22 Hen. VIII., c. xiv. ² *Vide* vol. ii. ³ Stat. 26 Hen. VIII., c. xii.

After these various experiments towards the abolition of clergy, the legislature now ventured further, and deprived persons in holy orders of the exemption with which they were still indulged by stat. 23 Henry VIII., c. 1, and other statutes. For it was enacted by stat. 28 Henry VIII., c. 1, that in all offences within stat. 23 Henry VIII., c. 1, stat. 25 Henry VIII., c. 3, and stat. 25 Henry VIII., c. 6, (concerning house-breakers and other offenders standing mute, and concerning sodomy), persons in holy orders shall be under the same pains and dangers, and be used and ordered as persons not within holy orders: so that real clerks were now liable to a capital punishment for felony, as well as nominal clerks.

The remaining statutes concerning clergy are stat. 33 Henry VIII., c. 1, and 14 stat. 33 Henry VIII., c. 12, sect. 26, and stat. 37 Henry VIII., c. 10, which last two we shall defer for the present. The first of these made it felony to practise witchcraft and enchantment, under pretence of discovering where stolen goods were to be found; and offenders of this kind, being *lawfully convicted*, were to lose the privilege of clergy and sanctuary: so that persons who stood mute, challenged peremptorily above twenty, or would not directly answer, were not deprived of clergy by the words of this act. It was on this account that future acts made to take away clergy were more particular in naming all possible instances of conviction and trial in which clergy should be lost, as will be seen in the statutes on this subject in subsequent reigns.

By stat. 33 Henry VIII., c. 14, persons making pretended prophecies, grounded upon coats of arms, badges, signets, fields, beasts, letters of names, or other fancies, were declared to be guilty of felony, without benefit of clergy or sanctuary: a very sharp law upon the folly and delusions of mankind, though a fit companion to that which went immediately before. It cannot be denied that both these practices might be abused to dangerous purposes; and, probably, some experience of that kind might have justified the parliament in contriving such severe means of suppressing them.

Since the statute of Henry VII. it was proper that a register of clerks-convict and attainted should be kept, that such persons might not have their privilege more than once. For this purpose it was enacted

Certificates of
attainder.

by stat. 34 and 35 Henry VIII., c. 14, that the clerk of the crown, of the peace, or of assize, within forty days, or, if no term, within twenty days after the beginning of the term following the forty days, any attainder, outlawry, or conviction was had, shall not only certify a transcript, in few words, of the indictment and proceedings, the name of the clerk, with time and place, and certainty of the felony, to the king's bench, there to remain of record, but also deliver a transcript of the indictment to the ordinary to whom the clerk was committed. The clerk of the crown in the king's bench was to receive them, and upon the request of any justice of gaol-delivery, or of the peace, was to certify the names of such clerks, with the causes of their conviction or attainder.

Having gone through all the statutes that relate to clergy, we shall now return to the 26th year of this king, and take a view of the remaining acts about the privilege of sanctuary. The privilege of sanctuary was taken from all offenders in high treason by stat. 26 Henry VIII., c. 13.¹ In the following year a law was made in aid of the regulation which had been lately established for the due ordering and safe custody of sanctuary-persons. It was directed by stat. 27 Henry VIII., c. 19, that all persons privileged in any sanctuary should wear a badge, and that any person who appeared abroad, out of the sanctuary, without such badge, should immediately lose his privilege, and be committed to the common gaol. Such persons were not to appear out of their lodging before sun-rising, or after sun-setting, upon pain of imprisonment; and for the third offence they were to lose their privilege. That the inhabitants of these privileged places might not look beyond the limits of their confinement in any case where their necessities could be supplied within, the governors of such sanctuaries were empowered to hold plea of debt under £40, and of trespasses and covenants between privileged persons and other inhabitants of the sanctuary.

Notwithstanding this attempt to regulate the economy of sanctuaries, some few years after it was thought more expedient to abolish certain of these privileged places; and not to allow those which remained to extend any immunity

¹ Sect. 3.

to offenders of a particular description. It was enacted by stat. 32 Henry VIII., c. 12, generally, that all sanctuaries, except parish churches and their churchyards, cathedral churches, hospitals, and churches collegiate, and all chapels dedicated and used as parish churches, should be extinguished and of no effect. But Wells in Somersetshire, Westminster, Northampton, Norwich, York, Derby, Launceston, and Manchester,¹ were still to continue places of sanctuary. This act was principally occasioned by the dissolution of religious houses, many of which had privilege of sanctuary; and the sites of them would still have enjoyed the same privilege, though the society which was to have the direction and government of it no longer existed; so that great disorders would probably have ensued, if a like provision had not been made.

It was moreover enacted that the following offenders should no longer enjoy the privilege of sanctuary in any place whatsoever, namely, those who committed wilful murder, rape, burglary, robbery in or near the highway, or in a house, putting the owner, his wife, children, servants, or any other within the same in fear of life; those who were guilty of felonious burning of houses, or barns with corn; robberies of churches, chapels, or other hallowed places, with their abettors and procurors; and all those from whom clergy was taken by any of the foregoing laws. Several new regulations were ordained by this act respecting sanctuaries. The chancellor was empowered to appoint commissioners to make perambulations, and to settle the boundaries of them. Not above twenty persons were to be admitted at one time into any sanctuary. Their names were to be called over every day; and if any made default three days together, he was to lose his privilege.

This was the last law made in this reign concerning these unhappy objects, who at this period seem to, and must, from the nature of the thing, have been very numerous, and not to be managed but with great difficulty. The institution itself, after all the care of the legislature to regulate it, was pregnant with evils, which never could be remedied but by entirely abolishing it. The best part of the laws we have just mentioned was that which took away this privilege from certain offences. These some-

¹ And instead of Manchester, *Chester*, by stat. 33 Hen. VIII., c. xv.

what abated the mischief, till this relic of superstition was quite destroyed in the reign of James I.

It may be thought that as many of these statutes relate to a subject which is now no more, a shorter account of them would have been sufficient (a); but the substance of them could not well be compressed in a smaller compass;

(a) On the other hand, it might well be thought that the author might have mentioned several others of practical importance at the present day, but which he has omitted to mention, as, for instance, the statutes of bridges (22 *Hen. VIII.*, c. vi.), and sewers (23 *Hen. VIII.*, c. v.), both founded on the same general principle, to make provision for the speedy remedy of a pressing public mischief. The statute of bridges enacted that the justices should determine questions of liability for bridges broken; and as it often could not be known what hundred or parish was bound to repair a bridge, that the hundred, parish, or city, within which the bridge should be situate, should repair it; and if it was part in one place and part in another, then the inhabitants of both places in proportion; and for speedy repair of the bridges the justices should tax the inhabitants, etc. To the like effect was the statute of sewers (23 *Hen. VIII.*, c. v.), founded upon the older act of 6 Henry VI., providing that commissions of sewers should be issued into all parts of the realm as need might require, to inquire by the oaths of men of the county where the annoyances might be, and through whose default, or who were damaged thereby, and all such persons to tax or assess as to the commissioners might seem meet; and to repair and amend the banks, ditches, etc., and to do all things which they in their discretion might think necessary; upon which it was held, however, in the reign of Elizabeth, that although the words of the commissions gave authority to the commissioners to do according to their discretion, yet their proceedings ought to be limited and bound by the rules of reason and of law (*Rooke's Case*, 5 *Coke*, 106). In that case, however, it was also held that if the owner of the land was bound by prescription to repair the river banks, yet the commissioners ought not to tax all who had land in danger; and to this purpose the statute was made. It was held in the reign of James I. that an assessment of commissioners of sewers upon a whole township is bad, unless it be afterwards apportioned; and therefore they cannot commit an inhabitant for non-payment — *certiorari lies* (*Helley v. Byer*, *Cro. Jac.*, 336). The commissioners could not, it was held, assess a whole township, but the assessment ought to be severally and proportionably made to every inhabitant (*Rooke's Case*, 5 *Coke*, 1000). The commissioners having assessed a fine upon a village, and appointed it to be levied on the cattle of an individual, which was done, he sued and recovered; and they, committing him to prison, were fined and imprisoned (*Ibid.*). It was probably to this case Lord Holt long afterwards alluded, when he said, that if they went contrary to the court of king's bench, they should be "laid by the seals" (*Grimwell v. Burnett*, *Salkeld's Reps.*). At common law there were customs through the whole country, by assent of neighbors, to levy sums to make bridges, causeways, or sea-walls; and by their assent to assess each neighbor at a sum certain, for which they may distrain (*Year-Book*, 44 *Edu. III.*, fol. 18). And Lord Coke lays it down that the inhabitants of a town may, without any custom, make ordinances or by-laws for the reparation of the church or highways, or for any sure thing which is for the general good of the public; and in such cases the greater part shall bind the whole, without any custom (*Chamberlain of London's Case*, 5 *Coke's Reps.*, 63).

and if they deserved consideration in a history of the changes in our law, they deserved, at least, to be treated in a manner that would render them intelligible. Indeed, if the consideration of a subsequent revolution was to have weight with the historian, not only these statutes, but most of the many criminal regulations, on which we have just been spending so much time, might be consigned to oblivion. For the sweeping acts of Edward VI. and Queen Mary repealed all the statutes taking away clergy, all those for trying treason in a way differing from the course of the common law, and all those creating treasons and felonies; and when these were abrogated, what remained to posterity of the penal laws of Henry VIII.?

CHAPTER XXX.

HENRY VIII.

LEASES FOR YEARS AND AT WILL—LEASES BY TENANT FOR LIFE, ETC.,—OF FINES—MANNER OF SUFFERING RECOVERIES—USES—A USE IN TAIL—OPERATION OF THE STATUTE OF USES—COVENANTS TO RAISE A USE—A LEASE AND RELEASE—CONSTRUCTION OF WILLS—THE COURT OF CHANCERY—COURT OF REQUESTS—PRESIDENT AND COUNCIL OF THE NORTH—ACTION OF COVENANTS—OF ASSUMPSIT AGAINST EXECUTORS—OF TROVER—DEBT AND ACCOMPT—THE CRIMINAL LAW—OF TRIALS IN TWO COUNTIES—THE ECCLESIASTICAL COURT—KING AND GOVERNMENT—BILLS OF ATTAINDER—TORTURE—OF THE STATUTES—OF THE YEAR-BOOKS—FITZHERBERT—ST. GERMAIN—RASTELL—PRINTING OF LAW BOOKS—THE REGISTER—MISCELLANEOUS FACTS.

THOUGH our courts during this reign furnished decisions upon almost every question in the law (*a*), we shall only select such of them as relate to the new points then mostly agitated, the alterations made by parliament

(*a*) Next to the laws relating to religion and the church, the laws relating to the titles, the transfers, and dispositions of land would be of importance; and the law and legislation in this reign on the subject, on the three great heads of fines and recoveries, uses, and wills, illustrate the close connection of those subjects, and also the gradual course and progress of our laws, and the way in which legislation followed the development of law, and merely carried out and sanctioned those improvements which that development showed to be required. Fines and recoveries were the common assurances of the kingdom; these assurances had come to be mostly to uses; and these uses were often for the purposes of last will or testament, and as a means of devise of land, for the most part to uses in tail. It was said in the courts more than once that the greater part of the land of the realm was held in such assurances and to such uses (19 *Hen. VIII.*, fol. 24; 27 *Hen. VIII.*, fol. 21); and that great mischief would result if they were disturbed. It was said also that many of the inheritances of the realm depended upon their assurances to uses (27 *Hen. VIII.*, fol. 10), and therefore that it would be a great mischief if they were not upheld. And as uses were made the means of last wills or testaments of land, it became necessary, for the same reason, to sanction wills of land. In all these cases law led the way to legislation, and the alterations had long been practically effected under the authority of the courts of law, before they were formally sanctioned by legislation. And the efficacy of the development of law in this reign, as a living growth resulting from a vital principle elicited by judicial decisions, is one of the most important lessons in our legal history. It was become a custom for men to make such settlements or trust-deeds of their lands by will, that they de-

having taken up too great a space to allow us to enlarge much on this part of our History.

frauded not only the king, "but all other lords, of their wards, marriages, and reliefs, and by the same artifice the king was deprived of his primer seisin," and the profits of the "livery" (*i. e.*, of seisin), which were no inconsiderable branches of his revenue. Henry made a bill to be drawn to moderate, not remedy, this abuse. He was contented that every man should have the liberty of disposing in this manner of half his land, and told parliament that if they would not take this, he would search out the extremity of the law, and then would not offer so much again. The commons nevertheless rejected the bill. They found, however, good reason to repent of their victory. The king made good his threats; he called together the judges and ablest lawyers, who argued the question in chancery, and it was decided that a man could not by law bequeath any part of his lands in prejudice of his heir (*Hume's Hist.*, c. xxx.). For this is cited the authority of Burnet and Hall; but the surer authority of the Year-Books refutes the story, which indeed in itself is incredible, for it is not likely that such a monarch as Henry would have relinquished half of any right to which he was by law entitled. The truth is precisely the contrary of what is here represented. The courts of law had decided a year or two previously that a man could, by means of conveyance to uses and declarations of last will, devise his lands (*Year-Book*, 27 *Hen. VIII.*, fol. 8); and even if it were done with the intent of avoiding the oppressive incidents of feudal tenure, it was not deemed on that account invalid. This was debated before the chancellor and all the judges in the case of Lord Dacres; and though the decision in that case, that is, the case of such a conveyance with intent to evade the feudal incidents of feudal tenure, is not distinctly stated, yet the validity of the transaction was so strongly maintained by some of the judges that it is evident that all events the point was doubtful. No doubt it had been held by one court that if a man, himself holding of the king, made a conveyance to uses, this would not deprive the king of a wardship (26 *Hen. VIII.*, fol. 3); but this was held in one court apparently in that much consideration, and may have been the very reason why next year the question was debated at great length before all the judges; and on that occasion, if the decision was not against the king, it left the matter in doubt. The historian had here fallen into errors, arising from a want of information as to the history of the law. It was so well settled that conveyances to uses might be used to devise land, and deprive lords of feudal services, that in the previous reign a statute had been passed carrying out one passed under Richard III., that if a man made feoffment of lands he held in chivalry, and no will was declared, the lord should have the issue in ward, as if the tenant had died seized (4 *Hen. VII.*). And upon this arose Delaware's case, in which it was implied that if a will were in such a case declared, it would take effect, although a last will (*Year-Book*, 10 *Hen. VII.*, fol. 10). And in another case, that of *Storrer*, which was much debated, it held that the statute only applied to the lord of whom the tenant held immediately; and therefore, as to the king, only as to land held of the crown *in capite*, *i. e.*, in right of the crown (*Year-Book*, 12 *Hen. VII.*, fol. 21, *Storrer's Case*). And it was then held by all the judges in the exchequer chamber that if a man held of the crown in socage, *i. e.*, by certain service, as rent, and conveyed to uses and died, the king should not have the wardship, for of such lands he should not have advantage of the statute. All that the historian had written upon the subject was based upon entire misapprehension. In the preceding reign a statute had passed, following one of the reign of Richard, recognizing conveyances to uses, even as to limitations to take effect after death, and only protecting the right of the

Many questions concerning leases of various kinds were agitated in this reign, and some were adjudged upon such

king or other lord as to wardships and marriages; and upon this it was held, in the 26 Henry VIII., some years before the statute of wills, that the heir of *cestui que use* need not sue livery (*i. e.*, delivery of seisin of his lands by the king); but the feoffees, after the heir who is a ward came to full age, should have a writ of *amoveas manus*, for the prerogative was *quando tenens regis obiit seisisit* when the king's tenant died seized; and he did not so in such case; and the statute of 4 Henry VII., it was added, did not aid, except as to wardship and relief, and not as to primer seisin or livery. And it is to be explained that livery was where the heir was a ward, and was under age, and afterwards came to full age; and primer seisin was where the heir was of full age at the time of the death of his ancestor (*vide* 26 Henry VIII., fol. 2, 3). Further, it has been held, in the reign of Henry VI., by all the judges of the exchequer chamber, that no one was bound to sue livery out of the hands of the king of lands held of him, unless they were held of him in chief (*in capite*), in right of his crown, or came to him by reason of such lands so held (28 Hen. VI., fol. 11). And it was held, in the present reign, that the heir of him who held of the king *in capite* in socage (*i. e.*, by certain service or rent), need not render primer seisin to the king for all his lands, but only for those so held in socage *in capite*; though it was otherwise of him who held a chivalry *in capite*, *i. e.*, held direct of the king by knight-service (38 Hen. VII., Bro. Abr., *Liverie et Ouster le maine*, fol. 60). And observe, that "livery" was where the heir had been in ward, and came to full age, he should have livery (*i. e.*, delivery of his lands) out of the hands of the king *extra manus regis*. And primer seisin was where the heir was of full age at the time of the death of the ancestor, or where the tenant held in socage *in capite* and died, there the king should have primer seisin (38 Hen. VIII., Bro. Abr., *Liverie*, fol. 60.) And the writ of *ouster le maine* or *amoveas manus* was a writ to oust the king without any profit to him. It was settled law that he who held even in chivalry, and not *in capite*, need not sue livery from the king, nor should the king have the custody of his other lands; and when his heir came of age, he should have *ouster le maine*; but if he was of full age at the death of his ancestor, he should render to the king a relief: *contra* tenant *in capite* (*Ibid.*, 62). Hence it will be seen that the incidents of feudal tenure did not attach to lands held in socage, unless held *in capite*, nor even to the full extent to lands held in chivalry, unless held *in capite*, *i. e.*, of the king in right of his crown; and, further, it was well settled that these incidents might to a great extent be evaded by means of conveyances to uses, even though to take effect by means of last will and testament. Before the statute of uses or the statute of wills, it was held that if a man conveyed his whole estate in fee to uses, and then died, the heir need not sue "livery" of his lands out of the hands of the king (32 Hen. VIII., Bro. Abr., *Liverie*, fol. 61). It was also settled law, and had been solemnly adjudged by all the judges in the exchequer chamber, so early as the 20th year of this reign, many years before these statutes, that lands might, by conveyances to uses and declaration of last will, be devised, so as to deprive the lord of the incidents of feudal tenure. And so the statute alluded to by the historian, as proposed a year or two afterwards, *i. e.*, in 1531, the 22d year of the reign, was an attempt not to allow of, but to restrain, the alienation of lands by devise, and to reimpose in such cases, to some extent, the incidents of feudal tenure. Of course such an attempt was resisted, and failed; and as the result alienations by uses and by wills were finally confirmed by statute. The tendency of the age to countenance and encourage any encroachments of the prerogative was shown in a very

sufficient grounds as to stand the test of future examination without being shaken. Of those which were only

striking way by the doctrine laid down in this reign as to the king's right of wardship by the law, as it had always been understood, that this only applied to tenure in chivalry, or by knight-service, and accordingly so it was held in the reign of Henry VII.; but Keilway, recording this in the reign of Henry VIII., says, "At this day the common experience is, that the king by his prerogative shall have the wardship as well of lands of which the ancestor died seized in use as in possession, and as well of land held in socage as by knight-service" (*Keilway*, 86). This was said to be by virtue of the stat. 4 Henry VII., as to uses; but that statute had been in force for some years, when, as Keilway reports, the king's right was held still restricted to tenants in chivalry. However, as has been seen, to a great extent the system of uses had tended to liberate land from feudal tenures. One of the subjects of judicial decision upon which the law, in the course of this reign, was greatly modified, if not altered, was that of the feudal services, which, by usage under the sanction of law, had become gradually commuted into fixed money payments or rents; so that, for instance, if lands were held of a castle by knight-service, it was commuted into so much for "suitage;" and if it was held by "castle-guard," it was commuted into a rent. The effect of this was twofold — first, that the payments became perpetual, and did not cease, as the services might have ceased, when the castle became ruinous; and next, that the tenure became changed into "socage," as it was called; for, as Littleton had laid it down in the reign of Edward IV., if plough-service or agricultural tenure was commuted into rent, it was "socage;" and so if any service of an uncertain nature was commuted into rent, it became tenure in socage. Thus in one of the first years of this reign, in a case where the tenant held of a castle by so much for suitage, and also by so much for castle-guard, it was held that though the castle had become ruinous, yet the rent remained; for when the tenant held of the lord to guard or repair the lord's castle, and afterwards such service (as Littleton said in the case of socage) was in ancient times changed by mutual consent into an annual rent, it was full and perpetual recompense, and was tenure in socage (*Bendloes*, 9). This will help to account for the subsequent assent of the crown to the act allowing bequests of land by last will; for of course if men had, by means of uses, found out an indirect mode of devising their lands, it was of no use to attempt to prevent it from being done. Another cause, however, no doubt co-operated, and it is curious to observe how changes in the law arose, incidentally and indirectly, by reason of the measures which, at first sight, would not appear to have had any connection therewith. It will be observed that the attempt on the part of the crown to restrain the power of the devise, by means of conveyances to uses, was in the 22d year of the reign, some years before the abolition of the monasteries; and it is to be observed, also, that the three great measures as to uses, wills, and fines (which were so largely used for the purpose of conveyances to uses), all passed some few years after the abolition of the monasteries. The connection of these measures is worthy of attention.

Nothing is of more importance in legal history than to observe the intimate connection between the development of law by judicial decision or legal practice and the course of legislation upon the law, in other words, between developed law and enacted law. Because it will be found that in the former are to be found, at this period of our legal history, the source and origin of the latter, being that almost all legislation on the subject of law did but follow upon, and in most cases did but follow out, some previous development of law by judicial decision. This has been repeatedly pointed out in the

agitated, but not decided upon, was a doubt upon a very common method of letting lands, whether it should be

notes to previous chapters of this history, especially in the present volume, which treats of a period when, by reason of that supremacy of law which had been established in consequence of the ascendancy acquired at this epoch by the royal authority, the courts of law were enabled in times of comparative peace and quiet to carry out the development of legal principles and settle the course of legal practice. The result was that at this period the development of law by judicial decision and the course of practice led to much legislation on the subject of law, and this in two ways: either by showing that a certain result was already practically though circuitously attainable by means of some legal doctrine or some legal practice, or, on the other hand, that a desirable result was not attainable by reason of some legal obstacle which required to be removed by legislation. Thus it was, for instance, with the subjects of uses and wills, which, as already has been seen, were closely connected, insomuch that men, by means of uses, were enabled to alienate their lands by last will, and thus in a great degree to escape the burden of certain feudal profits due to the lords upon succession to estates. The system of uses had arisen entirely under the sanction of the courts of law, and this having been found to be the result, a statute of Henry VII. passed to protect the lords from loss of feudal profits; but then, again, in the present reign it was held by the courts that if the lands of the king's tenant should be under conveyance to uses at the time of his death, though the king should have the wardship, by the statute, he should not have the primer seisin, for that the statute only spoke of wardship (*Keilway*, 176). And several judicial decisions established that, notwithstanding this statute, men could still, by means of conveyance to uses and declarations of wills, alienate their lands by last will (*Bro. Abr., Feoffment al uses*). This led, as already mentioned, to the statute of wills and the statute of uses, so that these great changes in our law grew out of legal practice and judicial decision. So as to the system of conveyance or assurance of lands by means of fines and recoveries, they had arisen entirely out of legal practice, and statutes only altered or amended that practice. Numerous instances can be cited from the books of fines so ancient as to go back beyond legal memory, *i. e.*, the time of Richard I., and the instance of such a fine, *i. e.*, used as a means of conveyance, as far back as that period, is put in a case occurring in this reign (*Keilway*, 123), while actual instances of conveyance by fines as far back as the reign of Henry III. have been cited from the Year-Books in the course of this work. This was entirely by legal practice. The statutes on the subject, the earliest of which were of the time of Edward I., merely made regulations as to the mode of levying fines, or other actions as to the mode in which they should be rendered penal; and the latest of these statutes, passed in the present reign, only carried out the object of former statutes, founded upon a system established by legal practice under the sanction of the courts of law, which rendered fines conveyances of record. So as to recoveries, which, being in fact recoveries by default in real actions, were entirely, like fines, the creation of the courts and the results of legal practice settled by judicial authority. Practice settled the course of procedure in such cases, *i. e.*, a procedure by means of proclamations upon the land, in order to afford public notice to parties interested to appear; and practice also gave a year for the purpose, after which parties and privies were barred. The legislature when, as in the last reign and the present, it settled the practice as to fines, by requiring public proclamations, only borrowed from the practice as to recoveries already established by the practice of the courts; and thus having secured the

construed a lease for years or at will; this led to much inquiry into the nature of a lease at will, and how it differed from a term for years.

same notoriety and publicity in fines as recoveries, gave them the same force and efficiency and finality. So judicial decision settled what parties should be deemed to be so interested as to be allowed to come forward and falsify or defeat a recovery; and a discussion or doubt on that subject in the courts of law, at the end of the last reign, lead to a measure passed in the present. It appears that it was a moot point whether a tenant for years could be permitted to falsify a recovery suffered collusively by his lessor; and it was said by one of the judges that he could not, if he did not come in pending the recovery, which implies that he could, if he did so come in (*Keilway*, 93). But as there appeared to be a doubt, it was settled by a statute passed in this reign (*Vide ante*, c. xxix.). This is only one of numerous instances in which judicial decisions or judicial doubts led to legislation. Many instances could be adduced in which the establishment by judicial decision of a certain legal principle led to momentous practical consequences. The effect of a recovery, by reason of the legal principle that a judgment or matter of record binds parties or privies, is a remarkable instance of this. So as to the great principle established by the courts of law by repeated decisions in previous reigns, and also in the present, that the tenant in tail did not take under the donor, but under his own ancestor, upon which depended the affirmation of that principle of estoppel, so as to make a fine efficacious to bar the issue in tail. So as to the remedies for the recovery of real property, and especially the application of the action of forcible entry, originally a remedy for the freeholder for the recovery of a term, by a course of legal practice under which the termor was allowed to use the name of the freeholder, which led to the ultimate substitution of the action of ejectment, originally a remedy for a termor, as a means of trying the title to the freehold, by allowing the claimant to sue in name of the termor. These changes, the first of which, if not the other, began in this reign, and which were entirely by force of legal practice under judicial authority, are instances of most important alterations so effected in the most important, because the most practical, part of law procedure. So in the whole course of judicial decisions by which the interests of tenants for years were protected, by giving them an easy remedy for the recovery of their terms, or by enabling them to obtain, by means of actions on the case, that redress for injuries to their interest which freeholders could recover by means of the old real actions. So as to the gradual substitution of actions in the case, even in cases where the real actions were the primary remedies — as for nuisances to land, and in a number of other cases, where they had not hitherto been used. So as to numerous other subjects on which legal principle had been developed by a course of judicial decisions, and led the way to legislation. There is to be observed also upon the subject, that judicial decisions at this period were arrived at with all the more deliberation, and obtained all the more authority, on account of a practice which had become established in the previous reign, and is to be noticed all through the present, viz., the practice of having cases argued before all the judges in the exchequer chamber. This practice probably commenced, and is indeed chiefly, if not entirely, to be observed in cases in the king's bench; and perhaps the reason for it was that, at this period, and until the statute of Elizabeth, there was no provision for error from that court to the exchequer chamber; and no doubt on account of that the practice had arisen, that when any case of great importance occurred, at all events in the king's bench, where the most important cases would arise,

In the third year of the king a lease came into question, where one had let to another, to hold *at his own will*; but it having been long laid down¹ that a lease at will must be at the will of both parties, it was held by three justices in the common pleas that this

Leases for years
and at will.

it was argued before all the judges in the exchequer chamber; in consequence of which, although the judgment was formally that of the king's bench alone, it virtually carried with it all the weight of a judgment by all the judges. Thus it was, for instance, that the great question of sanctuary was argued before all the judges in this reign; and these discussions led, no doubt, to the act virtually abolishing it, and the other statutes doing away with privilege of clergy in the worse cases (*Keilway*, 190). So an important decision as to forcible entry (*Ibid.*, 159). It is to be observed that cases came from the common pleas, on error, into the king's bench (*Ibid.*, 154), so that all cases of importance (except those in the exchequer, which went into the exchequer chamber by statute) came into that court, and hence the importance of this practice, by which all important cases in the king's bench were argued before all the judges, and determined by that court with the advantage of their assistance. It must be manifest, and will abundantly appear from an attentive study of the cases thus discussed and decided, that such full and careful consideration, and such deliberation in judgment as cases so decided, necessarily received the weight and value of judicial decisions, and their influence and effect in moulding the law must have been vastly enhanced. This therefore was, far above any former age, the era of regular judicial decisions, and the epoch of the development of law by means of such decisions. And it may be interesting and instructive to offer an instance (on a subject of common occurrence, and therefore of practical importance) of the manner in which legal principles were deduced by the judges from certain first principles of reason and primary elements of justice, and then applied and developed to the decision of other and more difficult cases. The instance selected is upon the very subject above noticed by the author, that of tenancy at will. It was held by the court of common pleas that on a lease at will it should be held to be at the will of both parties, for otherwise the lessee might choose to hold for his life (*Keilway*, 163); and then there is a reference to Potkins' case, above cited by the author, as having been decided on the same principle; and it was said also, that if land was let to a man for a year, and so on from year to year, at the will of the lessor, when the first year was determined, if the lessor suffered the lessee to enter on the second year, and occupy without notification of his will, then it should be taken that he was agreeable that the lessee should occupy all that year; for it should be against reason that the lessee should occupy the second year, and manure the land, and then that he should be ousted of the land (*Ibid.*, 164); and then again there is a reference to Potkins' case, above cited by the author, as having been decided on the same principle. A curious instance of the influence of law upon the condition of a nation was afforded in this reign. The law had been laid down before and in the early part of this reign, that the lord, during the nonage of the heir, could oust the termor of the ancestor; but the law on that point was altered by the judges, *i. e.*, it was held otherwise in this reign, on account of their finding the great inconvenience which ensued upon it, by disabling tenants by knight-service to make leases, because of the danger of such wardship happening during the year, and perceiving the decay of husbandry and the depopulation which attended it (*Jenkins' Centuries*, 202).

¹ *Vide* vol. iii.

should be construed to be at the will both of the lessor and lessee; for if it was at the will of the lessee, he might keep it, perhaps for his life, contrary to the rule of law, which says no freehold shall pass without livery.¹

But the occasion when the properties of this sort of lease were thoroughly discussed was in Potkyns' case, in 14 Henry VIII. A lease had been made to him in the 10th year of Henry VII., for term of a year, to commence at Michaelmas, and continue till the end of *the said year, and so to the next year, de anno in annum*, as long as the parties pleased. These were the terms of the lease. Potkyns held the land for twenty-four years; at the end of that time the lessor determined the lease, and brought an action of waste, upon which it was moved, in arrest of judgment, that it was only a holding at will, and therefore the defendant was not liable to waste under the statute. The objection was thus pointed: that the lease being only for a year, and beyond that from year to year, as long as the parties pleased, the first was a lease for a year, but the remainder was only at will; for, said they, every lease for years should have a certain determination, otherwise it is not a lease for a *term* for years; and here there is no certain determination, for it is at will; therefore, they concluded the first to be a good lease for a year, and the remainder to be only at will. This point was frequently argued at the bar, and when it came for the court to give judgment, there was as great a difference of opinion among the judges; for Fitzherbert and Brooke held it to be clearly a lease at will after the first year; but Pollard and Brudnell, the chief-justice, held it to be still a lease for a year. As this was a matter of some importance, being that upon which it was to depend whether there should be any longer such a description of estates as those at will, it may be curious to hear what was said on both sides.

It was said by Fitzherbert, who thought it was an estate at will after the first year (for there was no doubt about the first year), that if it was not a lease for years at the commencement, it could not be made so by occupation. And in answer to what had been urged by the counsel, he said it was a conceit to contend, that if the

¹ 3 Hen. VIII., Keilway, 162.

party held from year to year at the will of both, the *will* was only to be exercised at the commencement of every year: the will certainly extended to every part of the year; so that they might determine it at any part thereof. Again, when the counsel had said that the word *will* was void, he said it was not so: but that operated as a sort of condition; for if I let land for a year *at my will*, the lessee would assuredly have it only at my will. Thus, if I let for years, at my will (but leave *will* out), as a lease for a year, and so from year to year, without limiting the years: this, for want of a certain determination, could not be a lease for years; therefore, it must follow that it was a lease at will. Again, if a lease was made for years generally, without any certain limitation of years, then, in the opinion of some, he would have it only two years; for two years would satisfy the plural noun in the lease: but if it was for twenty years *at will*, this would be determinable at will by either party. The stat. Westminster 2 expressly requires that the lessee should have such an estate as the lessor could not determine; if a lease, therefore, for years was made to commence at such a feast, this would not be good, because it wanted the other limitation, when it was to end. The conceit of here being several leases for a year was reprobated equally by Brooke. He said that a lease for years should be perfect by the first wording of it, or it was not a lease for years; and this, he said, was an entire lease and not several, and the whole commenced at once, notwithstanding this pretended separation from year to year. Thus, if land was let from Michaelmas next, reserving rent till the Michaelmas following, and so the next year, and the third, this was a good lease for three years, because the beginning and determination of it was sufficiently certain, without waiting for any after circumstances to explain it.

The estates known in the law were fee-simple, fee-tail, for term of life, for term of years, and at will; and each was created by special words peculiar to itself: waste lay against tenant for life and for years by the statute; but tenant at will was at the common law. If a lease was made to a man till he was promoted to a benefice, and he had livery, he had an estate for term of life: so of a lease to baron and feme during the coverture; because these depended on a condition that had a human determination.

Not so of other conditions; for a lease so long as such a tree grew, is but at will; because, said Brooke, it is not natural for an estate to depend on such a condition. He thought that all estates for years should be certain in their determination, and not at the will of any one, for that would be a contrariety; for which reason he could not agree with those who said, that *a lease for ten years at will* should be determined at will; for the words *at will* were inconsistent and contrary, and therefore were void. He admitted an estate for years might be determinable at will, on a condition, but not otherwise; as on condition *if such a one is not satisfied, or declare his dissent, then it shall cease*. This is a good condition, although only at the will of a stranger. He admitted that to be certain in its determination, which could be made so by construction of the words creating it. That a lease *for years*, he agreed, might be construed good for *two years*, because that satisfied the plural term, and was the greatest certainty that could be obtained out of the words. A lease for a thousand days was good, because it was as certain to count by days as by years. If one leased for a year, and showed the commencement of the term, and so the second, third, and fourth year, this would be good for four years, because it was sufficiently certain when it commenced, and when it was to determine; but if it was from *year to year*, there was no certainty at all. Thus a lease for years, so long as I. S. lived, if no livery was made, would be only at will, because by the first words of its creation there was an uncertainty of determination; so there was no certainty in the first words of creation, when a lease was *from year to year*; but if it was for *one year, and so for the next year, and so from year to year*, it would be good for the first and second year; but for the others, for want of certainty, it would be only at will. He said he saw no difference between the above lease after the first two years, and one *for as many years as we can agree*; which, for want of certainty, would clearly be a lease only at will. Such were the reasons given by the two judges who thought this a lease at will.

On the other side, it was argued by Pollard that, considering how many leases were made in this way, it would be more reasonable to support it as a lease for years; and he thought it a very good lease for years. He said that although a lease *for years, and so from year to year*, would

be at will, because it was not determinable upon any certainty; yet, if a lease was made *for a year, and so from year to year, as long as the parties agreed*, the word so implied that the lessee should have the subsequent years in the same manner as he had the first; and it would be a good lease for ten or twenty years, if the parties so long agreed. The same as if the king granted a ward and marriage, and so *from ward to ward durante minore ætate*; in which case, if the ward died within age, and the next heir was likewise within age, the patentee would have that ward also, in the same manner as he had the first. And as it was agreed by the other side, that a lease for *a year, and so for the next*, was good for the next by reference, why should it not also be good, if *from year to year*? He said that if a lease was made for ten years at will, the words *at will* would be void; the same as in a feoffment in fee, an *habendum* for years would be void. As to the certain determination, he thought it ought to be determinable on a certainty, or on what, though not a certainty at first, might become certain; for a lease determinable on condition was not entirely certain in its determination. He said that in case of a lease from year to year at the will of the parties, when the lessee entered into any one of the years, neither the lessor nor the lessee could determine his will for that year; and if they went on so for ten years, it would be an entire lease, and not, as some said, a several lease every year.

In all this the Chief-Justice Brudnell agreed with Pol-lard. He added that a lease for years determinable on an uncertain event, was no uncommon thing. Thus a lease for years by an infant might be determined when he came of age; a lease by a tenant for life was determinable by his death; a lease with proviso that when the lessor had a mind to occupy the land, then the lease should cease, was held good, though determinable at will. He said a lease for three years, and so from three years to three years, was a common way of letting parsonages, and these were esteemed good leases. Again, a lease till the lessee had levied £10 of the rents and profits, was a good lease; and yet there was no certainty when it should determine: the same in this case, when the will was determined, then that certainty of determination had taken place which was marked by the terms of the original creation.

Such were the arguments used on both sides of this famous question, which, after all, was not determined, though they all agreed in giving judgment against the plaintiff. For notwithstanding the lease was at an end, as stated in the declaration, it was stated in the writ, *quem TENET ad terminum*, instead of *tenuit*; which variance was held fatal; and the principal question was left in its former state, with the addition of all the topics which this solemn discussion had furnished on both sides.¹ In 28 Henry VIII., a case similar to one that had been mentioned by the chief-justice is to be found in Dyer. A parson leased his rectory for the term of three years, and after the end of the three years, for another term of three years then immediately next and ensuing; and after the end of that three years, to the end of another three years, during all the term of the natural life of the lessor: and it was held, by the opinion of most of the benchers of the Middle Temple, and several justices of the common pleas, that the termor should have only an estate for nine years, if the lessor so long lived, for it wanted words to make an estate for the life of the lessor; but if it had been, *and so from three years to three years*, during the life of the lessor, this perhaps would have done: and it was said, that for the lessee to have a lease for the life of the rector, he should have livery of seisin.²

Other cases upon leases happened in this reign, which, though of less importance than the above, are more worth mention, because they were determined upon, and became guides in future times. These not being upon any particular head of inquiry, can be given only in a miscellaneous way. In 28 Henry VIII. we find a case came before the court, of a lease for a term of years, with a reservation of all woods and underwoods; and it was a question whether an action of waste would lie against the lessee for cutting trees. It seemed to Baldwin and Shelley that it would not; for the wood being excepted, made no part of the land demised, and the statute forbids waste *in terris, boscis, seu gardinis sibi dimissis*. However, they thought there might be a remedy by trespass.³

The nature of the possession of lessee for years was agitated in a case where the lessor made a feoffment while

¹ 14 Hen. VIII., 10 b.

² 28 Hen. VIII., 8. Dyer, 24, 151.

³ Ibid., 19, 110.

the termor was on the land, and in occupation of it: it was doubted whether the feoffee obtained thereby the freehold and rent. Shelley thought the feoffment was good, because the termor and the lessor having distinct interests, the one a chattel, the other a freehold, the freehold might well pass from the one without infringing the right of the other; though it would be otherwise, if the new estate had been a lease for years. But, on the other hand, Baldwin and Fitzherbert were of opinion, that nothing passed by the infeoffment, unless the termor agreed to it; for the lessor had no right in the possession during the term; and the livery and seisin being nothing but a transfer of the possession, it could not be made without injury to the termor: they held, therefore, that the common course should be adhered to, namely, for the lessor to grant the reversion, and the termor to attorn. Baldwin added, that if the feoffment was made with the concurrence of the termor, the term and the rent would be gone, for this would be a complete surrender: but Fitzherbert denied this, for the termor's interest could not be surrendered without his assent; and he quoted several cases where it had been held, that the termor's consent to a livery made by the lessor was consistent with the continuance of his term. However, after this canvass, the point went off without a decision.¹

A lease was not uncommonly made with a condition by which the lessee was bound not to alien to a particular person. It happened that a lessee being so bound, aliened to one who aliened to the person prohibited by the lease: it became a question, whether this was a breach of the condition: it seems to have been the opinion of Dyer that it was not, because every condition should be taken strictly.² He likened it to a feoffment on condition that the feoffee should not enfeoff I. S., and the heir enfeoffed I. S., which was no breach of the condition. Another case of this sort happened in the court of augmentations. A lease had been made for years, on condition that if the lessee during his life assigned his term to another without assent of the lessor, the lessor might enter. The lessee devised the term without the assent; and it was argued that this was a breach of the condition. It seemed to

¹ 28 Hen. VIII., 8. Dyer, 33, 13.

² 31 Hen. VIII. Dyer, 45, 1.

Brooke, and Hales, Master of the Rolls, that this was a forfeiture, for the devisee shall be said to be in possession of the assignment made in the lifetime of the lessee; and they took a difference between an assignment made by the law, and by the lessee himself; for they considered it as a clear case, that had the term been taken by an execution, there would have been no forfeiture. But this, like the former case, went off without a decision.¹

A lease for years was made of land with a stock of sheep upon it, and a rent was reserved. All the sheep died, and it was doubted whether the rent should be apportioned. The ground upon which those rested who thought it should be apportioned was, that it was the act of God, without any default in the lessee. But it was said that the law was otherwise; for if the sea overflowed the land, or it was burnt with wild-fire, the rent would not be apportioned, but the whole rent should issue out of the remainder; though where part was evicted by an elder title, the rent should be apportioned. And of this opinion were Bromely, Portman, Hales, serjeants; Locke, justice; Brooke and others of the Temple; but Marvyn, Browne, justices; Towshend, Griffith, and Foster, were of a contrary opinion: though all thought it consistent with reason and equity that the rent should be apportioned. This case was afterwards made the subject of a *reading* in one of the inns of court, as was very common in those days; and there it was the opinion of More, the reader, together with Brooke, Hudley, Fortescue, and Browne, justices, that the rent should be apportioned.²

No little debate, no small difference of opinion, arose upon the effect of leases made by tenants for life and other tenants, who though possessed of a greater estate than for their own lives, yet could not make leases that extended beyond that period, without infringing the claims and titles of those who followed them; all which showed the need there was for the parliament to take up the subject, and make some specific declaration thereon, as was actually done in this reign.³

We find it laid down by Fitzjames, Chief-Justice of the King's Bench, in the 24th year of the king, with the concurrence of many others, that if a

Leases by tenant
for life, etc.

¹ 32 Hen. VIII. Dyer, 45, 3.

² 35 Hen. VIII. Dyer, 56, 15.

³ *Vide ante.*

tenant for life leased land for years, and died, the lease became void, and the rent determined: the same of a parson's lease; and though his successor received the rent, the lease was not good against him; for being void by the death of the lessor, it could not be perfected by any acceptance or ratification.¹ In a subsequent case, we find a difference made between a lease for years and for life; for after recognizing the foregoing opinion, it was said, that if a parson made a lease for life, and died, and his successor accepted fealty, he should be bound by it during his life.² In the case of a lease for years, made by the Bishop of London, reserving rent to him and his successors, it was argued whether it was void by the bishop's death; and it was held by many that it was: though it was agreed, says Dyer, that an abbot, bishop, or those who have an estate of inheritance, as tenants in tail, might make a lease for years rendering rent; and it would not be void by their death, but voidable only at the pleasure of their successor, or the issue; for if they accepted the rent, the lease would be good. But they adhered to the former opinion, that in the case of a parson, or tenant for life, such lease would be absolutely void;³ and so it was again held, in the case of a parson's lease, in 38 Henry VIII.⁴

With regard to leases by tenant in tail, it was held by the justices of both benches, where *cestui que use* in tail and his feoffees made a lease for years, and died, and the issue aliened the land by fine, before he had made any entry upon the termor or received any rent, and the alienee accepted the rent; they held, that the alienee could not have avoided the lease, even if he had not accepted the rent;⁵ and that it could not be avoided without entry by the issue.

A method had been contrived, by which tenant in tail could make a lease for years that would be good against the issue. The tenant in tail and the intended lessee would acknowledge the land to be the right of A., a stranger; and then A. would, by the same fine, grant and render to the lessee for years, with remainder to the lessor and his heirs.⁶ This device is mentioned in a case in 36th of the king, which was four years after the *enabling act*,

¹ 24 Hen. VIII. New Cases, 152.

² 32 Hen. VIII. New Cases, 151.

³ 32 Hen. VIII. Dyer, 46, 9.

⁴ New Cases, 154.

⁵ 33 Hen. VIII. Dyer, 51, 17.

⁶ 36 Hen. VIII. New Cases, 142.

and the statute which made a *fine* a bar to the issue. As, therefore, before the one of those acts, a lease let in this way would not bind the issue, and after the other, the tenant was by law enabled to let under certain terms, so this contrivance seems to be necessary, since those acts, in cases where it was intended to grant a lease of longer date than twenty-one years, or three lives, or not within the other terms of the enabling act.

It was mostly in conjunction with the present fashionable conveyances, that topics of real property were agitated in the courts; a fine, a recovery, a deed to raise or convey uses, or a will, was usually the occasion upon which any litigation of this sort arose. To acquaint ourselves, therefore, more intimately with the leasing of real property in this reign, we shall now proceed to consider the methods in which it was most commonly transferred. First, of fines and recoveries.

Some questions upon the nature of fines and recoveries were agitated in our courts, and deserve not less attention than the statutes which have already been mentioned respecting those two methods of conveying lands and hereditaments.

In the 19th of the king, a very important question (which has already been alluded to)¹ was agitated, upon the effect of this statute of fines (*a*).
Of fines.
A tenant in tail had levied a fine with proclamations; and the five years passed in his lifetime: he died, and it

(a) In Coke's "Case of Fines," three judges were of opinion that the stat. 4 Henry VII. did not extend to an estate-tail, and they relied upon the words of a saving in that act, viz., saving to all their right to whom any right came or descended by force of any entail (3 *Coke's Reps.*, 84; 14 *Hen. VIII.*; 17 *Dyer*, 274). Jenkins says that these judges were in the right, and that the makers of the act never intended to make void the statute *De Donis*, and destroy estates-tail, but only intended to remedy the mischief which the statute of non-claim had introduced (*Jenkins' Centuries*, 192). But that mischief was, that the issue were not barred; and it is difficult to see what the act did if it did not bar the issue in tail. Moreover, the reason given by the three judges, viz., that the issue in tail did not come in under the ancestor, but under the donor, and so were not privies, was purely fallacious, and would apply equally to a recovery, and at all events had been held to be wrong again and again in courts of law. Jenkins says, "Because of this difference of opinion, the law was doubtful until the statute of 32 Henry VIII. was made, which ordained that a fine should bar the issue in tail." That act, however, was nearly half a century after the act of Henry VII. The law had all that time been left in doubt; and in point of fact it was not so; for the majority of the judges had settled it by solemn decisions.

¹ *Vide ante*.

was made a question, Whether his issue should be barred? This was argued at Serjeant's Inn before all the justices, who were divided in opinion. Englefield, Shelley, and Coningsby thought that the issue should not be barred; for they said, that by statute 4 Henry VII., c. 24, a fine was to conclude both privies and strangers, with certain savings; namely, to all persons and their heirs (other than the parties to the fine), their right and interest which they had at the day the fine was engrossed, so that they brought their action, or made their entry, within five years after the engrossing; saving also, to all other persons, such right, title, and interest as would first grow, remain, descend, or come to them after the fine engrossed, or proclamation made, by force of any entail, or other cause or matter done before the levying of the fine. They contended, by this last saving the issue in tail were aided; for they are the first to whom a right would descend after the engrossing of the fine: and though the father was privy to the fine, yet the issue is neither party nor privy; for he claims by the donor, and not by the donee, notwithstanding he must convey himself to the land by the father. For, they said, it was not like where a father disseized a grandfather of his land in fee, and levied a fine, then the grandfather dies, and afterwards the father; in which case the fine would bar the son, because he could not convey the fee-simple to himself but through the father, who was party to the fine, and therefore as heir to him he was privy to the fine.

The justices on the other side were Fitzjames, Brudnell, Fitzherbert, Brooke, and More. They said, that the intent of the makers of the statute, as appears by the words of it, was, that a fine should be at an end, and should conclude as well privies as strangers; and if no exception had been made in the above words, all persons, as well the issue in tail as others, would be concluded. As to the exceptions, they said, in the first there was no aid given but to femmes-covert; in the second, all strangers are aided who had title to the land at the time of the fine levied, if they brought their action, or made their entry within five years; but the issues are not aided by either of these two exceptions. The third saving is in favor of all other persons, which must be intended all strangers to the fine, and not privies; and by virtue of

that saving, all strangers to a fine, to whom a remainder in tail, or a descent in tail, shall first accrue after the engrossment, shall be aided. Thus, if tenant in tail discontinued, and the discontinuee levied a fine with proclamations, and the five years passed, and then the tenant in tail died, the issue might have another five years, by virtue of that saving in the act. The intention of the makers was not that he who claimed by the same title as his ancestor who levied the fine should be aided; for such issue in tail is privy to his ancestor by whom he is to make his descent, and all privies are clearly concluded by such a fine: they therefore were of opinion, that the issue in tail were barred by such fine. All the justices agreed, that if a stranger to a fine, to whom a remainder in tail or other title first accrued after the fine, did not make his claim within five years, his issue would be barred forever.¹ This, no doubt, became the governing opinion on the stat. 4 Henry VII. till, to remove all difference of sentiment, it was so declared by stat. 32 Henry VIII., as has been before shown.

There is nothing further in the books of importance on the subject of fines, till the 27th year of the king; when we find a case, where a fine had been levied *sur grant et rendre*; in which the conusee granted to the conusor the lands in tail, on condition that he and his heirs carried the standard of the conusee, when he went to battle; and if he or his heirs failed therein, then the land should remain to a stranger. Upon its being put to the court whether this was a good remainder, Fitzherbert said, he had never before seen a fine levied upon condition; and though he thought such a fine clearly good when levied, he doubted whether the justices would be willing to take such, because it was a very old language in the law-books, that *finis finem litibus imponit*; which seemed to him not much promoted by such conditions. As to the remainder, he thought it good; and that the stranger took it before the condition broken: and when it was objected that the remainder, as it depended on a condition, could not take effect till the condition was broken, he maintained what he had first said; but had it been a feoffment, he said, that if the remainder did not take effect at the time *livery*

¹ 19 Hen. VIII. Dyer, 2, 1.

was made, it could not afterwards. However, no judgment was given.¹

It was a common practice to make a lease for term of years by fine. The course was, first for the lessee to acknowledge the land to belong to the lessor, *come ceo, etc.*, and then for the lessor to grant and render it to the lessee.² The fine *sur grant et rendre* was a useful assurance in these and many other cases. Where it was covenanted that *A.* should make to *B.*, his wife, daughter of *J. K.*, a jointure by fine, it was contrived, on account of the infancy of *B.*, that the writ of covenant should be made between *J.* and *A.*, by which *A.* acknowledged the land to be the right of *J. come ceo que, etc.*, and *J.* granted and rendered it to *A.* for life, without impeachment of waste, with remainder to *B.*, his wife, for life, remainder to *A.* and his heirs.³ What effect a fine had on an estate *in use*, will be mentioned in another place.

The modern method of ordering a recovery, so as to make it a complete bar to all secret entails, and to those claiming in remainder, was not generally practised in this reign. They often contented themselves with a single voucher; and they brought the writ against the tenant whose estate was to be barred; both which were the precise circumstances in *Taltarum's* case: and though that decision seemed a sufficient warning, they continued more commonly to suffer a recovery in that way than in any other. In the 23d of the king, we find a writ of entry brought against the husband and wife of land, where the wife was tenant in tail, and they vouched over: this was held a bar to the issue in tail.⁴ Yet it was said, on another occasion, that if the husband survived the wife, then as the recompense would go to the survivor, this should not bar the issue.⁵ It was held that, where the writ was brought against the tenant for life, in order to bind the fee-simple, he ought to pray in aid of him in reversion, and they were then to vouch together.⁶ It was held in 25 Henry VIII. (which was before the statute for declaring void recoveries suffered by tenant for life), that if a tenant for life vouched a stranger, and the demandant recovered, and the tenant over in value, that the land

¹ 27 Hen. VIII., 24.

² New Cases, 142.

³ 30 Hen. VIII. New Cases, 139.

⁴ 23 Hen. VIII. New Cases, 250.

⁵ 25 Hen. VIII. New Cases, 251.

⁶ 25 Hen. VIII. New Cases, 251.

recovered in value would not go to the reversioner after the death of the tenant for life; so, that, in all reason, such recovery ought not to be a bar to the person in reversion.¹

In another case, about five years after, it was said that where there was tenant for life, and he was impleaded, and vouched him in remainder in tail, or for life, who vouched over one who had title of formedon, and so the recovery was had, there the issue of him who had title of formedon, might bring his formedon, and recover against the tenant for life; for the supposed recompense should not go to the tenant for life, because the ancestor warranted only the remainder (says the report), and not the estate for term of life; and therefore the tenant for life, who was not warranted by the ancestor, could not bind him by the recovery. In such case, it was recommended that the tenant for life should pray in aid of him in remainder, and they should join and vouch him who had title of formedon; and if the recovery was passed in that manner, the recompense would go to both.²

Where there was a tenant for life with remainder over, or tenant in tail, the remainder over, and he was impleaded, and vouched over a stranger, and the recovery was had in that manner; it was held by Montague, justice, and others, that this would bind the entail, for the recompense would go to him in remainder. It is remarked upon this case by Brooke, that the law was determined to be otherwise by all the justices in the case of Lord Zouch and Stowell in chancery, and he thought the reason was this: That when he vouched a stranger, the recompense should not go to him in remainder; though it would be otherwise if he vouched the donor or his heir.³

Notwithstanding these discordant opinions about the manner of ordering a recovery, it is evident that some recoveries were suffered in the precise way we now see them; for so early as the 23d of this king it was laid down that a recovery with single voucher only gave the estate which the tenant in tail had at the time of the recovery; so that if he was in of another estate, then the entail would not be bound against the heir: it was therefore recommended to suffer the recovery with *double voucher*.⁴ The way to effect this was for the tenant in tail to discon-

¹ 25 Hen. VIII. New Cases, 251.

² 30 Hen. VIII. New Cases, 252.

³ 27 Hen. VIII. New Cases, 252.

⁴ 23 Hen. VIII. New Cases, 270.

tinue his estate, by making a freehold to somebody against whom the *præcipe* might be brought; that person being tenant of the land, and also to the writ of *præcipe* would vouch the tenant in tail, who would vouch over some stranger, called the *common vouchee*, and so lose the land. Here, as the tenant in tail vouched *generally*, and the stranger entered with the warranty *generally*, the recompense would be held to ensue the general warranty; in consequence of which the tenant in tail, and all persons claiming through him, under whatever estate, would be barred; it being in the power of none to say the warranty was annexed to some other estate, and not to that which he claimed. This was a recovery settled upon the principle of *Taltarum's* case, as a complete bar to all estates that the tenant should claim.

The following question arose upon a recovery. A writ of entry was brought against a tenant in tail; there was a voucher and recovery in value against the common vouchee; but before execution sued, the tenant in tail died, and the issue entered; it was submitted to the court, whether the recoveror might not enter; and it seemed to Fitzherbert and Baldwin that he might well enter, for the issue, on account of the recovery over in value could not falsify the recovery, as he might if there had been no recovery over in value. But Shelley thought the issues were remitted by the death of the tenant. After the delivery of these two opinions, the matter went off without a decision;¹ and so the question remained till it was solemnly settled in the reign of Queen Elizabeth. Another question of difficulty respecting a recovery, and also a fine, was put to the court of common pleas, but received no decision. It was asked if a tenant in tail, the reversion in the king, levied a fine or suffered a recovery, the heir would be barred. The court seemed to think that the heir would be barred, though it was no discontinuance of the entail, nor had any effect as against the king in reversion. Englefield said he had before met with such a case, and, upon good advice, it had been thought a bar (by which it may be supposed he meant a bar to the king, for the report had before said that they had *all* agreed upon its being a bar to the issue); but Shelley expressed a doubt of it.

¹ 29 Hen. VIII. Dyer, 35, 28.

Whether it was one or the other, we have already seen that this difficulty was removed about three years after by statute.¹

The law and doctrine of uses constituted one of the principal subjects of discussion during the whole of this reign; and so unsettled were men's minds upon the nature and qualities of this new sort of property, that questions of this kind were agitated with great difference of opinion. To convey to the reader an idea of this controversy about uses, it may perhaps be the best way to state the cases that appear on this head in our books, in the order in which they happened, as this will more readily exhibit the progress of opinions.

A case happened, in the 14th year of the king, where it was necessary to enter fully into the nature of uses. The feoffees had granted a rent to a person who was apprised of the use, and afterwards made a feoffment thereof, and the *cestui que use* released all his right to the feoffee; the grantee distrained for the rent, and it became a question, whether the rent should be considered as to the use of the *cestui que use*, as the land was, or to the use of the grantee. It was maintained by Pollard, Brooke, and Fitzherbert, justices, that the rent should be to the use of *cestui que use*, and then the release of the *cestui que use* to the feoffee extinguished it by stat. 1 Richard III., which allows the release of *cestui que use*, to be good against him, his heirs, his feoffees and their heirs: they held likewise, where a feoffment to a use was made, that the heir of the feoffee, and his feoffee, and all persons who were in the *per*, without consideration (or upon consideration, if they had notice of the first use), should be seized to the same use; but otherwise of those who came in in the *post*. For it was said by Newdigate, sergeant, if feoffees to a use die without heirs, and the lord enters by escheats, he should be seized to his own use. Again, if the heir of the feoffee was within age, he should be in ward to the lord, and the lord have the profits, and the feoffee's wife her dower to her own use; hers being an estate given her by law, though she is said to be in by her baron. The husband of a woman seized to a use should likewise be tenant by the courtesy, and be considered as in in the *post*, to his own use.

¹ 28 and 29 Hen. VIII. Dyer, 32. *Vide ante*.

Again, if the feoffee to a use was bound in a statute-merchant, the land was liable to be taken in execution. The feoffees might grant offices, as that of a steward, bailiff, receiver, and the like.

But Fitzherbert said, that if a man made a feoffment without consideration, the feoffee should be seized to the use of the feoffor, or to the same use to which the feoffor was seized; and if a feoffee was seized of a seigniority to a use, and land escheated, he should have the escheat to the same use as the seigniority. Again, if the feoffee of a seigniority recovered in value upon a voucher, it was to the first use. To this Pollard agreed, and Brooke admitting that the wife of the feoffee should be endowed to her own, if she took her dower at common law, thought it would be otherwise, if it was dower *ex assensu patris* or *ad ostium ecclesiæ*; for in such cases she would be in by the feoffee; but the other was in by the law, as well as *per le baron*, and indeed without any act of her own. If a feoffee made a gift in tail, without specifying any use, he thought the donee should be seized to his own use; for here was a consideration, namely, a tenure between them, unless a use was specially expressed at the time of the gift: so in a devise by will, the use would be to the devisee, unless otherwise expressed, because there was a consideration implied: so a feoffment to a corporation or abbey would be to their own use, unless otherwise expressed. There seemed to be no doubt of what was laid down about considerations and notice; but they all agreed in it very fully, namely, that a feoffment by feoffees to a use without consideration, was to the first use, if upon consideration; if to one who had no notice of the use, the use was changed, and, of course, if with notice and consideration, the first use remained. Brudnell, the chief-justice, carried the rule about feoffments by feoffees still further, for he said, should the feoffees make a lease for life, with remainder for life, remainder in fee, to persons who had notice of the use, they should be seized to the first use, notwithstanding the division of estates. All this was agreed in by the judges, as to the nature of uses, and the estate and power of feoffees to a use; but upon the main question they differed, all of them but Brudnell holding the rent void, because a man could not have a use and a rent out of the same land.¹

¹ Hen. VIII., 4.

When a feoffment was made to uses that were declared by deed, this, like other grants, was not to be revoked; and any charge upon or disposal of the land contrary to the tenor of such uses already declared, were utterly void. However, as a will differed so diametrically from a deed, that every later was a legal abrogation of the former, so uses declared by will might be revoked and changed as often as the testator pleased. It happened that a person made a feoffment to the use of his will, and added *prout in hoc scripto*, namely, to the use of *B.* for life, and so on; afterwards he made a lease for years, and died; and it being a question whether this lease was good, it was held by the court, that, notwithstanding the words *prout in hoc scripto*, this was clearly a feoffment to the use of the last will, which might be changed in part, or in the whole, and therefore the lease was a revocation *pro tanto*. They added, if a feoffment was made to the use of a schedule annexed, and that schedule was made in the form of a will, it might be altered as a will might.¹

The question whether *cestui que use* in tail had any power to alien under stat. 1 Richard III. was again agitated,² and was argued before all the judges in Serjeant's Inn. The question was stated, whether if such a person made a lease or feoffment, or suffered a recovery, the issue and the feoffees should be bound by it after his death. The judges were divided in opinion: Fitzjames, Norwiche, Fitzherbert, Lister, chief-baron, and Port, held that it would not bind the feoffees, because the statute makes such gifts and grants good against the grantor and his heir, claiming as heir to the grantor; but claiming as *heir of the body*, they said, was different from claiming as *heir*. For if feoffees were seized to the use of *B.* for life, remainder to the use of *C.* and his heirs, and *C.* was heir-apparent to *B.*, and afterwards *B.* made a feoffment, or suffered a recovery, this would not bind the feoffees after the death of *B.*, because he claimed as purchaser, and not as heir. They said, every feoffee who claimed to a use in tail, did not claim to the use of the feoffor and his heirs, as the statute of Richard III. expressly required, but to the use of the issue in tail; and they vouched an authority in the last

¹ 19 Hen. VIII., 11.

² *Vide ante*, c. xxiv.

reign,¹ which declared that the feoffment of *cestui que use* in tail did not bind the issue after his death. In the case of a feoffment to the use of an abbot, the feoffees were seized to the use of him and his successors, and not to the use of him and his heirs, so that a feoffment by the abbot would not be good.

However, Englefield, Spelman, and Shelley were of a different opinion. They said, that before the statute *de donis* every tenant in tail *post prolem suscitata*m had power to alien, in spite of the donor and his heirs, so that he had in effect a fee-simple; and all that this statute did was to restrain the donee and his heirs from aliening. But in the case in question, there was no gift of land in tail; the land was given to the feoffees in fee-simple, and the use, though called a use in tail, was in truth no tail within the statute, and was therefore at common law a land *post prolem suscitata*m; any alienation therefore by *cestui que use* in tail, after issue, ought to bind the feoffees. They argued, that the stat. of Richard III. would become of no effect, if feoffees could invalidate such grants after the death of *cestui que use*. It was, however, agreed by the majority that a grant, feoffment, lease, or release by *cestui que use* in tail, could not bar the feoffees,² and they thought the same of a recovery.

However people might acquiesce in the above decision, as far as it affected voluntary grants by deed, or acts, *in pais*, they would not endure that a recovery, which had lately been recognized as a bar to an estate tail in possession, should not be allowed the same force when applied to the like estate in use. This point was frequently agitated in this reign, both before and after the statute of uses, and with different success. It appeared in two shapes; either where the recovery was suffered by the tenant or by the feoffees. The following case of this kind was after the statute.

In the 29th year of the king it was held that if the feoffees to the use of an estate-tail, or other use, suffered a recovery upon a bargain, this should bind the feoffees and their heirs, and *cestui que use*, and his heirs, where the buyer and recoveror had no notice of the first use. To this it was added by Fitzherbert (who had, as we have

¹ 4 Hen. VII., 17.² 19 Hen. VIII., 13.

seen, concurred in disallowing a recovery by tenant in tail himself), that it should bind, though he had notice of the use; for the feoffees, having the fee-simple, might by law suffer a recovery. It was at the same time held by many (among whom it cannot be supposed Fitzherbert was one), that if *cestui que use* in tail was vouched in a recovery, it should bind the tail in use, both as to the tenant and his heirs; which opinion was founded, as Brooke thinks, upon the authority of stat. Richard III.,¹ and, most probably, upon the reasoning of the dissenting judges in the case before-mentioned, in the 19th of the king. We find, in the next year, a doubt was entertained whether a recovery against a *cestui que use* in tail would bind the issue; and it is said by Hales, justice, that true it is, by such recovery, the entry of the feoffees is taken away; but after the death of the tenant, the feoffees may have a writ of right, or writ of entry *ad terminum qui præterit* in the *post*, or the like writ. It was questioned, in answer to the above reasoning about the statute *de donis*, whether a use might not be within the equity of that act; and they reasoned upon the statute of Richard III. just in the way that the judges who concurred in the decision in the 19th of the king had treated it.² The same year another recovery of this kind came in question; and this recovery, as we are told, had been advised by Fitz, serjeant. It does not appear whether that was Fitzherbert, who, we have seen, thought, when upon the bench, such recoveries void. It happened in this case, that the tenant in tail died without issue, and the brother claiming the estate in chancery, the recovery was held to be good no longer than the life of the recoverer.³ Thus stood this question at the close of the reign of Henry VIII.

Fitzherbert seems not to have been always governed by the same general principles upon this subject; for, notwithstanding a fine levied by *cestui que use* in tail stands exactly upon the same grounds with a recovery, he gave a clear and explicit opinion in the 27th year of the king, that such a fine was good. The case in which he delivered this opinion is worth mentioning for another reason: *cestui que use* to him and his wife, and the heirs of the body of

¹ 29 Hen. VIII. New Cases, 129.

² 30 Hen. VIII. New Cases, 135.

³ 30 Hen. VIII. New Cases, 131.

the husband, bargained and sold his land for so much money, and then he and his wife levied a fine to a stranger. It was said this fine was void, for at the time of levying it the parties had nothing either in use or in possession, for by the bargain and sale the use was in the bargainee, and nothing was either in the husband, the wife, or the stranger, so that the fine could no way be valid. Fitzherbert observed upon this, that he would never buy land unless the *cestui que use* made first a feoffment, and afterwards levied a fine.¹ In the thirtieth year of the king, it was rather thought that a fine levied by *cestui que use*, though it bound him and his heirs, should not bind him in reversion, nor the feoffees, after the death of the conusor; for under the stat. 1 Richard III., only he and his heirs, and his feoffees, claiming to his use, were to be barred, which was not so here. This doubt, as to the issue in tail, was settled by stat. 32 Henry VIII., c. 36, as we have before related.²

To return from recoveries and fines suffered by *cestui que use* in tail to the nature of uses in general. In the 24th of the king we find a case where a man had made a feoffment in fee to four persons to his own use, and the feoffees made a gift in tail without consideration to a stranger, who had no notice of the first use, *habendum* in tail to the use of *cestui que use* and his heirs. On a former occasion we met with a *dictum* declaring such estate in tail to be good; and it was now accordingly adjudged, by the concurring opinion of all the judges,³ that the tenant in tail should not be seized to the first use, but to his own. They said that the statute *de donis* ordains, *quòd voluntas donatoris in omnibus observetur*. Now, no one can be seized to the use of another, but one who can execute an estate to the *cestui que use*, which tenant in tail cannot do; for if he was, the issue might have a formedon, to recover the estate according to the will of the donor. The same of an abbot, mayor, and commonalty, and other corporations, as was before said; for if an abbot executed an estate, his successor might have a writ of entry *sine assensu capituli*. The same of such as were in the *post*, as those by escheat, mortmain, perquisite of a villain, recovery, dower, tenant by the courtésy, and the like, who were always seized to

¹ 27 Hen. VIII., 20 b.² *Vide ante*.³ 27 Hen. VIII., 10.

their own use. They repeated what had been said on a former occasion, that there was a tenure between the donor and donee, which raised a consideration, and therefore entitled the tenant in tail to be seized to his own use. The same, they said, of a tenant for term of life and years; for where fealty was due, and a rent was reserved, there, though a use was absolutely expressed to the donor or lessor, yet those circumstances were construed to amount to such a consideration that the donee or lessee should have the land to their own use. The same where a man sold his lands for £20 by indenture, and executed an estate to his own use, this would be a void use; for the law upon the consideration of money construes the land to be in the vendee. It is laid down by Fitzherbert that should the feoffees to the use of an estate-tail sell the land to one who had notice of the use, the buyer should be seized to his own use, and not to the use of the estate-tail; and this, because of the consideration of money; and because the feoffees, having a fee-simple, could make a good common-law conveyance.¹

The notion of tenure being a consideration sufficient to raise a use, they carried still further. They said that uses were at common law before the statute *quia emptores*; for, before that act, upon every feoffment there was a tenure between the feoffor and the feoffee, which was such a consideration as entitled the feoffee to be seized to his own use: but after that act, every feoffee was to hold *de capitali domino fedi*; so that there was no consideration between the feoffor and feoffee, without money paid, or other special matter, in consideration of which the feoffee might become entitled to be seized to his own use. For, according to the opinion of Shelley, when the father enfeoffed the son and heir-apparent, as was common in the reign of Henry III., before stat. Marl.,² to defraud the lord of his ward, this feoffment was to the use of the father, who took the profits during his life. The same in case of a feoffment made by a woman to a man to marry her; the woman took the profits after the espousals; though this might be doubted, as Brooke thinks, because there was an express consideration. Again, it was held by Norwiche, if a man delivered money to T. S. to buy land for him, but he

¹ New Cases, 136.

² Vide vol. ii., c. viii.

bought the land to his own use, yet this would be construed by law to be to the use of him who delivered the money.¹

After all this debate upon the nature of uses, and when they had been recognized both by parliament and the courts for many years, a very singular attack was made upon them by the counsel of the crown. This was, no doubt, at the instigation of Henry VIII., who had frequently expressed his disapprobation of uses; and after long complaint of the loss he suffered in wardships and other casualties of tenure, had proposed plans for curtailing them, which had not yet succeeded. He seems, this year, to have attacked them both in Westminster Hall and in parliament. The case alluded to arose upon the will of the Lord Dacres, a family which, at this time, by one accident or other, gave occasion to the discussion of several points of law. The stat. 4 Henry VII., which was one of the statutes of pernors of profits, and secured to lords the wardship of such heirs as were seized only of the use, and not in possession, had an exception in favor of appointments by the ancestor's last will. The Lord Dacres, by his will, had authorized his feoffees to pay his debts, after which he limited his estate to his son in tail, the remainder over in fee. An office was found, declaring all this, and suggesting that the will was made by covin and collusion. This being returned into chancery, it was there litigated by the feoffees before the chancellor and all the judges of England. It was contended, in support of the inquisition, first, that a use was not at common law; secondly, that it was not testamentary; thirdly, that the present will was covinous. In support of the first position, they seemed to adduce nothing to show that this sort of property was not at common law, but merely that there was no mention of it before the time of memory in 1 Richard I. and the following reigns. To this sort of argument the other side answered that common law did not mean such ancient usage as the counsel for the king now called for, but only common reason; and it was reasonable enough that one man should confide in another. In proof that the common law admitted such a confidence, they recurred to the statutes of pernors of profits, from

¹ 24 Hen. VIII. New Cases, 126.

the reign of Edward III. downward: in short, they declared it not a point to be disputed. In support of the second position, they said that a use should follow the nature of the land; and as it was partible, if of gavelkind, and descended to the youngest son, if of borough English, the same as the land, it was reasonable it should not be devisable any more than other inheritances, unless by special custom. To this it was answered that a use might pass by bargain and sale by parole; and it would be strange if after that it should not be devisable by will; and that, at any rate, such a devise was good by stat. 1 Richard III.; and they quoted a determination in 20th year of the king, where, after some struggle, it was so determined. The third point, which regarded covin, they seemed to found upon the stat. Marlbridge, made against covinous feoffments of an ancestor to prevent the wardship of the heir; concluding, that every will which had the same effect should, by the equity of that act, be pronounced covinous. The answer to this was, that the present will carried no covin in it, being merely to settle the estate, and that it was within the saving of stat. 4 Henry VII.¹

Such were the principal grounds upon which this case was argued on both sides: what the decision was does not appear. The aspersions which were thrown upon uses by the crown lawyers on this occasion, and the bold manner in which they controverted such established positions of the common law, as the lawful existence of uses, and their being testamentary, showed that the crown was ripe for giving the final blow to this species of property, which was at length intended by the statute of uses passed this same year.

The statute of uses caused a great revolution in this title of the law. A use, from being an equitable estate, became now a legal one; and the right to the fruits and profits being converted into the actual seisin of the land, no longer stood in need of the court of chancery to give it effect, but was cognizable in the courts of common law. The authority of the court of chancery over landed property was by these means much abridged and diminished. This for a time had a sensible effect; but, when limitations of a new impression were

Operation of the
statute of uses.

¹ 27 Hen. VIII., 7 b.

brought before courts of law, certain technical scruples arose which the judges did not think themselves at liberty to get over, and things in some measure began to fall back into their old channel. An opinion was delivered in the 36th year of this king, that though a feoffment "to a man for life, and after his decease that *I. N.* shall take the profits," be a clear use, and executed by the statute; yet, if it had been that "after his death the feoffees should receive the profits, and pay them over to *I. N.*,"¹ as *I. N.* would receive nothing but through the hands of the feoffees, this would not be executed by the statute. After this it was seen that notwithstanding the stat. 27 Henry VIII., there must be recourse to the aid of a court of equity for the execution of certain uses that were particularly circumstanced.

The question on the statute of uses which created most doubt, was the condition of the feoffees; what interest, what power remained in them, when, at the instant of their appointment, the statute transferred the possession out of them to the *cestui que use*. Many of the opinions which had prevailed respecting feoffees after the statute of Richard III. were argued upon after the stat. 27 Henry VIII.; they were still considered as seized in fee of the land, notwithstanding the operation of the statute, as appears from many of the cases that have been before mentioned: so that, upon the whole, a subsisting interest seemed to be attributed to them, as a kind of guardians and trustees to the *cestui que use*; which interest, if at any time partially displaced, could be again brought into being by such an act of ownership as that of entry, or at least by action. According to this notion, the state of the feoffees after the statute of Henry VIII. continued the same as it was after the statute of Richard III., when the concurrent rights of the feoffees and of the *cestui que use* occasioned so much strife. This is another strong instance in which this statute was disappointed of its effect; and this circumstance contributed to lay a foundation for much of the curious reasoning that afterwards arose upon conveyances to uses.

If the intention of the parliament was frustrated in these instances, so was it by the manner of conveying es-

¹ 36 Hen. VIII. Bro. Feoff. al Use, 52.

tates which soon followed. It was evidently a principal object of the makers of that act, that land should thenceforward be transferred, as anciently, by feoffment, with livery of seisin, and by other common-law assurances; whereby the notoriety of the alienation might add stability and quiet to every man's possession and right: but it is remarkable, that this very statute, on the contrary, contributed, in the end, to bring feoffments into entire disuse, and gave rise to a secret mode of conveying land pregnant with all the inconveniences and mischiefs before complained of. They reasoned in this manner: if he who is seized of the use becomes by force of the statute seized of the land, then to give the use, is, in effect, to give the land; and the facility and privacy with which this may be transacted renders it a desirable way of effecting that purpose. Upon this principle, the conveyances before in practice were continued, legitimated as they now were by the operation of the statute upon them; and others were soon invented of the like nature. A conveyance to uses became, on many accounts, the commonest, and perhaps the surest, mode of transferring land. These conveyances have continued in practice ever since; and to give effect to them is now one of the principal operations of the statute.

The parliament soon saw that this would be the consequence of the statute, in one instance; for, if the statute executed every use that was raised, a person who wanted to part with his land had nothing to do but to raise a use by *bargain and sale*, as was then commonly practiced, and the statute would confirm the *cestui que use* in the seisin of the land as fully as if there had been a transmutation of possession by feoffment, fine, or recovery. To prevent the mischief of this in some degree, it was enacted by stat. 26 Henry VIII., c. 16, that no bargain and sale should enure to pass a freehold, unless the same be made by *indenture*, and be enrolled within six months in one of the courts at Westminster, or with the *custos rotulorum* of the county; after which provision, it was thought the conveyance of a use would be as notorious as the ancient common-law assurances. As to deeds to declare uses, as they were only appendages to others which made a real transfer of the possession, the allowing of them to continue as they were, it was imagined, would not have any very bad tendency.

Covenants to raise uses were still in practice, notwithstanding they had been reprobated by judicial opinions of the courts of law in the last reign.¹ Uses were originally a matter of invention; and they had not been so long canvassed in our courts as to preclude every private person from persisting in such opinions as his fancy or judgment might have dictated, even in opposition to one or two declarations from the judges. With these sentiments, many still advised them as sure conveyances; and as such they were practised all through this reign, till they at length obtained a degree of legal recognition.

The general question as to the validity of a *covenant* to change property, was agitated in the great case of the Prior of St. John's, in 27 Henry VIII.; and it was there agreed, that if a man covenanted, that on the payment of so much money another should have his lease of the manor of Dale, the other, upon payment, might enter immediately; for this bargain altered the possession the same, says the book, as if it had been a bargain for money.² This was a decision which, it was thought, afforded a ground of law upon which the force of a covenant to change use might be argued with great degree of probability.

It was probably on such foundation as this that the determination in 32 Henry VIII. proceeded. It was there laid down, that where covenants and agreements, and not uses, were contained in indentures; as if it was covenanted that *A.* should recover against *B.* his land in *D.*, to the use of the recoveror and his heirs, *and to the uses of the covenants and agreements in the indenture*; there, if he recovered, the recovery would be to the use of the recoveror and his heirs only, and *not* to the uses of the covenants and agreements in the indentures. But, say they, if uses were specified in the indenture, and it was covenanted that *A.* should recover to the use of *A.* and his heirs, *and to the uses in the indenture*, there the recovery would go to such use, and be executed by the statute.³ Here is a plain declaration that a use might be conveyed by covenant. Conformably with this general resolution, we find two years afterwards an opinion of all the judges, after great deliberation, in favor of covenants to convey uses. It

¹ *Vide ante.*

² 27 Hen. VIII., 16 b.

³ 32 Hen. VIII. New Cases, 133.

was determined in *Mantell's case* (who had been attainted with the Lord Dacres), that where he after the statute of uses had made a covenant for £100, and in consideration of marriage, that he and his heirs, and all persons seized of his lands and tenements in Dale, should be seized of them to the use of his wife for term of her life, and then to the heirs of his body begotten upon her, that this would change the use; and upon this decision the land was saved from forfeiture.¹

Thus was a covenant *executed* become a conveyance of the use; and, by the operation of the statute upon it, it had the effect of a conveyance of the freehold. In this manner was one of the difficulties in the reign of Henry VII. as to this instrument removed; but the other still remained: for as to covenants *executory*, that is, where it was covenanted that after the covenantor's death his son, or some other person, should have the use, there is no decision in this reign which goes farther than to show that the fee-simple was not in such case taken out of the covenantor; and of course, that he was only liable to an action of covenant, if he exercised the full power of a tenant in fee, and disappointed the future use.²

When it was agreed that covenants should be permitted to raise uses, it was expedient to prescribe some rules for their government. The first object in this, as in all questions about conveying a use, was the consideration. And it was laid down by Hales, in 36 Henry VIII., that a use shall not be changed by covenant on a consideration passed; as if one covenanted to be seized to the use of *T. S.* because *T. S.* is his cousin, or because *W. S.* before had given him £20, unless it was given for the same land. But a consideration, present or future, was held to be a good consideration, as a consideration of £100, paid at the time of the covenant, or to be paid at a future day, or to marry one's daughter, or the like.³ Covenants, and the consideration on which they might be raised, were a new branch of the learning of uses, and were much agitated in the following reigns.

Before the question of a covenant was settled in this way, and while men were indulging themselves in every

¹ 34 Hen. VIII. Bro. Feoff. al Use, 16.

² 34 and 35 Hen. VIII. Dyer, 55, 3.

³ 36 Hen. VIII. New Cases, 135.

contrivance to maintain these secret methods of conveying their estates, the conveyance by *lease and release* was devised by Serjeant Moore. This is said to have been framed by that ingenious lawyer for the satisfaction of the Lord Norris, who wanted to conceal from his family the settlement of his estate, a matter that could have created no difficulty but in the interval between the statute which enjoined the enrolment of a bargain and sale, and this determination in favor of covenants to stand seized. This method of conveying was probably copied from the common-law assurance by a lease and afterwards a release, as practised in the time of Henry VI. and Edward IV.¹ The way of ordering a lease and release was this: First a bargain and sale was made of a term for years, which the statute just mentioned not considering, we may suppose, of sufficient importance, does not require should be enrolled: the bargainee being thus possessed of the term, by force of the statute, was in a capacity to receive a *release* of the inheritance. The deed of release contained the whole settlement of the estate so conveyed, to the various uses and purposes intended to be provided for.

After attempts to limit estates in perpetuity had been so often made, and so repeatedly discountenanced and defeated by our courts, these new conveyances to uses were laid hold on as a mode for making a fresh experiment on this subject. Being a modern invention, and confessedly in defiance of the ancient course of the common law, it was perhaps thought that such estates as might not, after former precedents, be limited in possession, might yet be declared in use. The nature of an use seemed to favor this inclination to convey and shift property by the limitations of a deed: it was a creation of the feoffor's, was wholly at his disposal, and was cognizable in a court where the dictates of general reason and equity were supposed to supersede the rigid precedents of a partial and antiquated system. It was probably owing to ideas like these that many of the limitations of estates which began to appear about this time were made. In the 38th of Henry VIII. there is mention of a conveyance of this kind, which was contrived for the purpose of preventing all the

¹ *Vide* vol. iii., c. xxi.

persons taking under it from breaking in upon the limitation thereby made. The grantor enfeoffed two persons to the use of himself for life, without impeachment of waste; and after his death, to the use of his son and his heirs, until the son should assent and conclude to alien the estate, or any part thereof, or to charge or encumber it; and after, and immediately upon such assent and conclusion, to the use of A. and his heirs, with the same proviso, and so on to others.¹ It appears that such devises were now very common; but none of them coming into court, we know not the sentiments of the judges upon them, and must wait till a subsequent period, when they underwent some discussion. These are "the upstart and wild provisos and limitations" which are so reprobated by a great lawyer,² in whose time they began to grow into great discredit, after the encouragement they had received by some adjudications in their favor.³

The introduction of uses tended much to embrangle questions of real property, and the whole law of estates; these difficulties increased after the stat. of Richard III. had given to *cestui que use* the same power over the land which the feoffees had before, and still continued to retain. When the stat. 27 Henry VIII. conveyed the possession to the use, new perplexities arose of a similar kind. Before we take leave of this subject, it will be proper to give the reader some instances of these complicated questions, which we shall now do, without entering minutely into the arguments in which they were canvassed.

It has been before remarked, that the casualty of wardship was intimately connected with uses; and this fruit of tenure was the topic which most interested the king in the suppression of this new species of conveyance. In our law-books, in various cases, this connection between uses and wardship appears; and some of the most complicated questions relating to the latter arose from estates in use. A remarkable case of this kind was argued in the court of common pleas, on a writ of ward brought by the Abbot of Bury against Elizabeth Bockenham. Certain persons being seized to the use of Bockenham in fee, enfeoffed other feoffees to the use of Bockenham and Elizabeth his wife for her life, with remainder to Bockenham

¹ 38 Hen. VIII. New Cases 31.

³ Particularly by *Scholastica's Case*.

² Pref. 4 Rep.

in fee. Bockenham died, leaving a son under age. The lands being held of the abbot, he brought his writ; and it was a question, whether the infant should be in ward to the plaintiff. After frequent argument, the judges differed: Shelley and Fitzherbert holding that he should not be in ward to the abbot, and Baldwin that he should. No judgment was given; but it is said that the abbot had the ward by consent, agreeably with the opinion which afterwards prevailed, namely, that the heir was not in of the new use, but of the old one; so that being in the old reversion as heir to his father, and not in of the new remainder by purchase, he should be in ward.¹

Two settlements made by the Lord Burgh (which have been already mentioned for another purpose) gave occasion to a question upon the wardship of his grandson. In an indenture of covenant on his marriage, before the stat. 27 Henry VIII., he declares the uses of a recovery to his son and his wife, and the heirs of the body of his son; after the statute, the son had issue and died, leaving the issue within age; the land was holden of the king, and it was a question, whether the infant should be in ward to the crown, or out of ward, during the life of the mother. This matter was heard in the new *Court of Wards and Liveries*, and it was held by the king's serjeant and attorney, by the attorney of wards, by Brooke, and others, that the issue should be out of ward during the life of the Lord Burgh, who was still the king's tenant; for having expressed no use of the fee, the ancient use of the fee-simple remained in him; and so when the statute passed, the possession vested in the son and his wife, as the use before did, and the fee-simple in the father, who was donor of the use. At the time of the same marriage, the Lord Burgh settled other lands by covenant in this way, namely, "That his eldest son, immediately after his death, should have in possession, or in use, all his lands," etc. In this, as in the former, the question of wardship turned upon the fee-simple, whether it was out of the covenantor; and they held that it was not.²

The breaking into old settlements, and then resettling the family estate, as in one of the preceding instances, in a new way, furnished frequent questions of remitter.

¹ 28 Hen. VIII. Dyer, 7, 11.

² 34 and 35 Hen. VIII. Dyer, 54, 1.

These were always difficult points, and were rendered still more complex by their connection with uses. This will be evident from the following instances. Tenant in tail made a feoffment before the stat. 27 Henry VIII. to the use of his wife for life, remainder to his son and heir in fee; after this the statute passed, then the feoffor died, and then the wife and the son entered; it was doubted, whether he should be remitted to the entail. Dyer seems to think he should not, because the statute executed the possession in him in the same manner in which he had the use, and that was in fee; but he thought the issue would be remitted. Again, a woman tenant in tail took husband, who made a feoffment before the stat. 27 Henry VIII. to the use of himself and his heirs, and after having issue by his wife, he died: the wife died, the issue entered and made a feoffment to the use of himself and his wife and his heirs, and then died, leaving an heir within age; then the stat. 27 Henry VIII. was passed; afterwards the wife died, and a question arose, whether he was remitted to the entail. No decision was made in either of these cases; but in the following, which was of a feoffment in fee by a tenant in tail, who died, his heir within age, after which the statute passed; it was adjudged, in conformity with the opinion of Dyer before mentioned, that the heir was not remitted.¹ The expectation in all these cases was, that because an estate was thrown upon the *cestui que use* by the statute, it was within the common-law notion of a remitter, that he should possess not in the form in which it was cast upon him by the law, but in his better or more ancient right, by remitter. But this reasoning was done away by another which was equally technical and refined; for it was answered by Baldwin, the chief-justice, that the estate was not cast upon the *cestui que use* by the law, but by *his own act*; namely, by an act of parliament, to which every man is a party.² The better reason, however, was, that the statute gave the possession and seisin in no other way than the party had the use, and no seisin could be conveyed to an use which he had not.

The statute of wills may be considered as having introduced a new species of conveyance. A devise became

¹ 34 Hen. VIII. Dyer, 54, 21, 22.

² 28 Hen. VIII. Dyer, 23, 148.

now a common assurance, which effected a complete transfer of the freehold. We have seen, that many points had already been determined on Of wills. wills of land devisable by custom, from which the formal and effective parts of a will were tolerably well settled; but a new turn was now given to these instruments. The practice of devising *uses*, where it was not the custom to devise the *land*, had lately made wills much more frequent than they had been. These, which were nothing more in effect than declarations of uses, became precedents for wills after the statute of wills: so that, in addition to the loose wording which was allowed in wills of land at common law, and the liberal construction which they received, in order by all possible ways to give effect to the intention of the deceased, however untechnically expressed; in addition to these properties and circumstances relating to wills of land, they were now to be considered, likewise, in the light of declarations of uses, and as such were to be interpreted with great indulgence and equity. These considerations rendered the subject of wills of land somewhat curious and complicated; especially when entangled in the distinctions and refinements with which entails and limitations abounded. The difficulty in all these cases was, how to effectuate the intention of a testator, without intrenching on some rule of law.

In reviewing what was done by the courts in forming and modelling the law of devises, our attention is first caught by those determinations which illustrate the remark we have just been making on the equity with which these instruments were construed, and the contrast which they, on that account, exhibited, when compared with grants. This constitutes the most interesting topic in the law of devises, and will demand our attention in a particular manner, as devises were now authorized by parliament, and the occasions for discussing them were more frequent.

The first information upon this head presents itself in the 19th of the king; when Englefield states Construction of wills. it as an acknowledged point of law, upon which he might argue, that a devise to a man in fee, and if he dies without heirs, then to another, was void in law; for a fee-simple could not by law depend upon another.¹

¹ 19 Hen. VIII., 3.

This is an instance in which no indulgence was allowed to a gift by will, beyond that of deed. This question was considered some few years afterwards, when a reason was given why the law would not suffer such a devise. A man had given his land to a religious house, by the custom of London, which allowed lands purchased to be given in mortmain; with this condition, *ita quodd reddant* so much money yearly to the dean and chapter of St. Paul's; and if they failed, that their estate should cease, and the dean and chapter and their successors should enter. Upon an entry being made, it was held clearly by Baldwin and Fitzherbert, that the condition was void; for, said they, it could not remain after a gift of the fee-simple, the feoffor having determined his interest and right: besides, a stranger could not enter for the condition broken, but only the heir.¹ It may be remembered, that the very reason given by Littleton why the limitations in Justice Richel's will were void was, because the heir, and not a stranger, was the proper person to enter for a condition broken.² The distinction had not yet taken place between conditions and conditional limitations.

The same scruples which the courts had in allowing a fee to be given after a fee by will were entertained respecting the devise of a chattel-interest; they were as jealous of these perpetuities as of the former, though they began to relax in this reign as to the latter. A man possessed of a term for forty years made his will, and devised it to his eldest daughter, and the heirs of her body; and if she died without any, then to his second daughter in tail. The eldest daughter married, and dying without issue within the term, the husband sold it; and it was doubted whether the second daughter had any remedy. It was there said by Baldwin and Shelley that she had no remedy, the devise being against law; for a term could not be given in remainder any more than a chattel-personal, as had been determined, they said, in the reign of Henry VI. Englefield thought the remainder was good, considering it was by will; and the intention of the testator was to be effected as well as it could. This was no more than, in other words, that if the eldest daughter died without

¹ 23 and 29 Hen. VIII. Dyer, 33, 12.

² Vide vol. iii.

issue within the term, the second should have it. To this it was observed by Baldwin, that the cases were different ; for he approved of a devise of a term upon condition, and that if the devisee died during the term, a stranger should have it, for then the whole term and interest would not be given, but only so much as elapsed during his life. But here the testator made an absolute unqualified gift to the eldest daughter. And he said that he had been concerned, when a serjeant in a case similar to the present, and that was determined to be ill.¹

The former was a devise of a term *in tail* ; it was afterwards laid down for law, that where a term for years or other chattel was devised *for life*, with remainder over, there, if the devisee did not alien it, the person in remainder should have it. But if he had disposed of it, the remainderman had been without remedy.² This was sanctioning an absolute gift of a chattel for life, with remainder over. In a subsequent case it was laid down so largely as apparently to warrant a remainder after an inheritance in tail, if the occupation and not the thing itself was given. For it is said to have been agreed for law that the *occupation* of a chattel might be devised by way of remainder ; but if the thing itself were devised to be used, the remainder would be void ; for a gift or devise of a chattel, if but for an hour, was the same as forever ; and the donee or devisee might dispose of it as he pleased,³ an opinion that was not wholly novel.⁴ Thus was the rigor of the old law gradually softening, till these testamentary dispositions were at length recognized by the courts under the name of *executory devises*, which ought in reason to be supported and rendered effectual.

Whenever the judges could dispense with the rigor of the old forms of conveying property, they were ready to give all assistance towards establishing a devise. The following is a strong instance of this favorable construction. A man had devised that *T. S.* should have his land after the death of his wife ; they held that, upon this devise, the wife should have the land for her life, because they thought it evident, from the manner of the gift, that the testator meant it so.⁵ In the following case a rule of

¹ 28 Hen. VIII. Dyer, 7, 8.

⁴ *Vide ante.*

² 33 Hen. VIII. New Cases, 49.

⁵ 29 Hen. VIII. New Cases, 80.

³ New Cases, 83.

law was made to give way to the great object of fulfilling the intention of a testator. Land had been devised to two, *et hæredibus eorum*; it was held by Lord Audley, then chancellor, that the surviving devisee should not take the entire estate by survivor, but only a moiety.¹ Again, a devise to a man and his heirs-male was construed by Fitzherbert and Shelley to be clearly an estate-tail, without the word *body*: because it appeared the intention of the testator that it should be so.² Where a man willed that his feoffees should make an estate to *I. N.*, and the heirs of his body, this was supported as a complete devise, because of the testator's intention.³ If a devise was made to *I. N.*, without adding anything more, it would, like a gift or grant, be only for life; but this might be explained by circumstances to mean a larger estate, as where it was said, "paying £100 to *A. B.*," this was held to give a fee-simple: and if the devisee did not pay it himself, his heir or executor might.⁴

No point in the law of devises had created more discussion than the power delegated to executors to sell land. A statute was made in this reign to remove one difficulty, but many still remained. The following is an instance where a question of this kind was argued with much difference of opinion. A man devised land to his son in tail; and if he died without issue, he willed that *A.* and *B.*, his executors, should sell it. *A.* died, *B.* survived, and made *M.* his executor, and died; then the son died without issue, and *M.* sold the land; the question was, whether this sale was good. This case was argued in the exchequer chamber before all the judges, when it was agreed by all, except Norwiche, Fitzherbert, and Moore, that the sale was not good. The three dissenting justices urged the old rule of law, that the will of the testator should be supported by all intendments, though not expressed in clear words. Thus a devise *in perpetuum* was construed a fee-simple. A devise "to give and to sell as he pleases," had been construed a fee-simple, because the meaning of the testator in these two cases appeared to be such. So here the testator must have been aware that the estate-tail might last beyond the life of his two executors, and therefore he meant that the land should be sold by their repre-

¹ 30 Hen. VIII. New Cases, 81.

² 27 Hen. VIII., 27.

³ 38 Hen. VIII. New Cases, 82.

⁴ 29 Hen. VIII. New Cases, 277.

sentatives, that being the only way in which the executors could sell. Thus, they said, if a man willed that his feoffees should sell, yet if it happened that the land had been passed by recovery or fine, and not by feoffment, then the recoverors or conusees would have the power, because it was the testator's intent that those who had the land should sell it; and that was of more importance than the particular name under which they held it. If a will was that, after the expiration of an estate-tail, the Chief-Justice of England should sell the land, it must mean the chief-justice for the time being, and not at the time of making the will.

On the other side it was said that this was not a testamentary donation, but a *power* to a particular person to do a certain act; and as that related to the disposal of land, and so required more circumstance than the disposal of personal things, they thought it should be construed more strictly on that account; for a person might give a verbal direction to dispose of any chattel to another; but if he would give authority to make livery of seisin, it must be in writing. The law so much favored the inheritance in preference to the disposition by will, that if there was anything uncertain and doubtful, the land would go to the heir. Thus, if a will was that *H.* should sell land, and he died before he had sold it, it should not be sold at all; for the heir of *H.* could not sell under the words of the will, it being a trust in *H.*, which, if he did not perform according to the will, the land would go to the heir of the testator. Again, if a testator directed that *B.* and *C.* should sell his land, *B.* could not alone sell it, because the trust was joint. The same of a letter of attorney to two to make livery; one could not make it; and if to one, he could not transfer the trust to another. If I desire a person to seal an obligation for me, he could not authorize another to do it. So, in the present case, the two executors could not, much less could the one who survived give the trust to another, namely, to their executors.

As to the intent of the testator, they said that could be carried no further than his words would support it; for every one must allow, that where a will authorized such a prior or such a mayor to sell his land, and there was no such mayor or prior, that the land could not be

sold, notwithstanding it was the testator's intent that it should. In many cases a will failed of its intention, either on account of the uncertainty who was to execute it, or of the person who was to execute it failing; as if a testator had willed that his executors should sell his land, and afterwards forgot to name any, or willed that it should be sold, but did not say by whom; in all these cases the will would be so far void. But if land was to be sold by the heir of *B.*, this was such a general term as would include every heir to the twentieth degree, as well *ex parte matris* as *ex parte patris*; but if *B.* died without heirs, or was attainted, the land could not be sold.

The testator in the present case being *cestui que use*, the justices took occasion to consider the devise in that light; and it was agreed by all of them, that before the stat. 1 Richard III. a will of land made by him who had the use was not good, unless the feoffee would concur in substantiating it; and now, they said, it was only by equity of that statute that a will by *cestui que use* was good. They said, that when this power was given to his executors, the term *executors* was a *descriptio personæ*, and did not mean all persons who by law might become executors, as by stat. 25 Edward III., c. 5, executors of executors; and they said, in this case, if *A.* and *B.* had declined administering the effects, they, though not really executors, might still sell under the power.¹

Such were the arguments on both sides of this question. It was probably owing to this ample discussion that the parliament, about two years after, came to a resolution to remedy the consequences which followed from some of the opinions here delivered for law. It was declared by stat. 21 Henry VIII. that when one or more of the executors refused to take upon them the administration, the others who had might sell. This, however, left untouched almost everything delivered above; which, after the agreement of so many judges, must be considered as the law of the time. It seems, too, as if this statute had been construed by equity so as to authorize certain acts which were not legal on the principles of the above resolutions of the judges. In the 30th of the king, where land was to be sold by the executors after the death of

¹ 19 Hen. VIII., 9.

J. S., and the testator made four executors and died, and then two of the executors died, and then J. S. died; it was held by some, that the two surviving executors might sell, because the time for selling was but just then arrived;¹ and that was also the opinion of Brooke.²

The next object is the jurisdiction of courts. The alterations and innovations that were made in our judicial polity by parliament have already been related. Henry made others by his own authority. The natural course of events will always contribute to give a new turn to the practice and proceedings of courts. We have seen how the king's bench had acquired an accession of civil business; and in what manner that was increased by the disuse of real actions, and the increase of actions upon the case. But with respect to these, they made some distinction. Some of these were considered as not proper subjects of cognizance here. It was held in this reign, that an action upon the case against an hostler, for a horse stolen out of a common inn, would not lie in the king's bench; the same opinion prevailed where a person negligently kept his fire;³ and in some other instances.

It is stated by a writer of this reign, that the court of chancery would give relief in covenants made without writings, if there were sufficient witnesses to prove them; and discovery of evidences might be obtained there, when the plaintiff knew not the certainty of them, or what they contained. A singular piece of equity was administered in the following instance, which is mentioned as a common course of relief in that court. A man bound in an obligation was sued in a county where the deed was not executed: the obligor brought his bill, surmising, that by such foreign suit he was ousted of divers pleas which he might have had, if the action had been brought in the proper county: this was conceived a proper subject for relief in equity; which was, we may suppose, by injunction.⁴

The court of
chancery.

The jurisdiction of this court was greatly enlarged during the time that Cardinal Wolsey presided there. He chose to exercise his equitable authority over everything which could be a matter of judicial inquiry. At length, finding himself loaded with the number of petitions, often

¹ 30 Hen. VIII. New Cases, 82.

² Ibid., 81.

³ Div. of Courts.

⁴ Ibid.

full of untrue surmises and frivolous complaints, he grew weary of attending to all these himself; and therefore, as well for his ease at all times as to provide persons to supply his place when absent on political avocations, he caused four courts to be erected by commission from the king. One of these was held at Whitehall; another before the king's almoner, Dr. Stokesby, afterwards Bishop of London; a third at the treasury-chamber; the fourth at the rolls, before Cuthbert Tunstall, who was then master of the rolls, and used, in consequence of this appointment, to hear causes there in the afternoon.¹

This was the first instance of the master of the rolls hearing causes, he having before been only the principal of that council of masters assigned for the chancellor's assistance; nor is there any notice of a person being authorized to hear causes in the chancellor's absence till now, when not only the master of the rolls had this delegated jurisdiction, but also the several courts just mentioned.

The cardinal maintained his equitable jurisdiction with a high hand, entertaining in one department or other complaints of almost every kind, and deciding with very little regard to the common law. This conduct in his judicial capacity furnished grounds of accusation against him, when articles were exhibited containing an enumeration of all this great minister's offences. He was charged with having examined many matters in chancery after judgment given at common law, and obliging the parties to restore what was taken under execution of such judgments.² He was accused of granting injunctions without any bill filed;³ and when those would not do, of sending for the judges, and reprimanding them.⁴ There is no mention of these courts which he had procured to be established, and which probably at that time were thought perfectly legal under the king's commission. After all, notwithstanding these complaints of the cardinal's administration of justice, he has the reputation of having acted with great ability in his office of chancellor, which lay heavier upon him than it had upon any of his predecessors, owing to the too great ease with which he entertained suits, and the extraordinary influx of business which might be attributed to other causes.

¹ Hist. Chanc., 55.

² Articles against Wolsey, 20.

³ Ibid., 21.

⁴ Ibid., 26. 4 Inst., 92.

This ceased with the removal of the chancellor; and the business there soon sunk to its natural level, perhaps rather below it. It is said that Sir Thomas More, in 22 Henry VIII., read all the bills himself; that on some of the days in term there was no cause nor motion; and that at one time he had actually dismissed every cause in his court. The statutes of wills and of uses, in a course of time, supplied new materials, and furnished full employment for the chancellor, who again began to stand in need of assistance, which led to confirming the master of the rolls in his new judicial authority.

As the chancellor was to administer justice according to the dictates of his conscience, some persons were curious to inquire to what duties in the discharge of his office the same obligation of conscience ought to bind him. In this point they seem to have rigidly exacted a scrupulous exercise of his duty from this judge of equity. It is declared by an advocate with this new court, that if the chancellor granted a subpoena without taking surety, as required by stat. 15 Henry VI., c. 4, and the matter of bill being found untrue, the plaintiff was unable to satisfy the damages the defendant had sustained, the chancellor was bound in conscience to yield them. Again, if a bill was brought after judgment passed in the king's court, and he took sureties that were afterwards found insufficient, and the bill was proved untrue, he would be bound to render the damages, because it was enacted by stat. 4 Henry IV., c. 23, that judgments in the king's courts should not be examined in the chancery, parliament, or elsewhere. So if the chancellor gave judgment upon vehement conjecture, or other information without proof, and better information was offered him, he was held to be bound in conscience either to amend his sentence, or make restoration to the party of all he lost by it. But if he proceeded upon proofs that turned out to be untrue, no redress need be made, because he had resorted to that trial which was appointed by law; for the better opinion seems to have been that the chancellor was to determine *secundum allegata et probata*, and not according to his conjectures and surmises, as some held, under an idea of reaching the real truth of the case; and it was accordingly held, that if a person had no proof by witness, in writing, or otherwise, he could have no remedy in chan-

cery. The chancellor, however, might so far exercise his discretion as, upon a very special cause, and not otherwise, to admit a person, as well after publishing of witnesses as before, to allege any new matter that had recently come to his knowledge. For the like purpose a great latitude in pleading was allowed. They held also that he might suffer the parties to change their demurrer, which was not allowed in any other of the courts. Again, a double plea, or departure in pleading, or two pleas, where one went to the whole bill, were considered as no irregularity in chancery; for the truth was to be investigated by any possible means, except surmise or conjecture.

Some went so far as to make the chancellor liable in conscience if he granted a subpoena on a matter cognizable at common law; others made a distinction where the matter was apparent, and where it was doubtful; others would make him answerable for unnecessary delays in suits. But all these were refinements that ended in mere speculation; for the chancellor, being a judge of record, was not compellable by law to make amends to any one for errors of judgment, or for any judicial proceeding directed by him.¹

Notwithstanding the chancery was now long established in possession of its equity jurisdiction, there were not wanting advocates for the ancient common law, who took upon them to controvert this novel practice by subpoena: this led to a discussion, in which the nature of this jurisdiction was canvassed on both sides very strenuously, but with very different force and success.

Those who questioned this new judicature contended that it was unreasonable for the chancellor to dispense with the common law of the realm in favor of a particular person, who by some negligence or folly had disabled himself from obtaining redress in the usual course of proceeding; that what was so done in the chancery was contrary to the common law; and if it was right and lawful, the common law must needs be abrogated, for two contrary laws ought not to prevail at the same time. They marvelled how the chancellor dared to issue writs of subpoena to restrain persons from obtaining redress at the common law, which the king himself could not do by law. The

¹ Harg. Tracts, vol. i., 348.

judges were sworn to administer the law indifferently, which the chancellor was not; the serjeants were sworn to see the king's subjects justified by the law, determinable by the king's judges, but not by the chancellor; all which was contravened, if any man could be stopped from his suit by subpœna. Again, if the known law of the realm was to be overruled by the discretion of one man, what dependence could the subject have? conscience, the great criterion of decision in this court, being too variable and unascertained to be a rule of judicial determination.

They attributed the great license of chancellors to their being most commonly spiritual men ignorant of the common law, who, trusting to their own sagacity, thought they could correct with ease what appeared to them to be defective in the ancient law of the realm. And yet who ever looked into the "*Natura Brevium*" would find that the common law had provided remedies for most of the injuries that could be sustained, although there was no mention of any writ of subpœna; which if authorized by the common law, would surely have been inserted there for the instruction of students. Finally, they contended that the whole proceeding by subpœna was in direct violation of stat. 20 Edward III., by which neither the chancellor, nor any other, ought to send any writ or writing to any justices to prevent their proceeding according to the common law of the realm; for, said they, it is the same mischief to send such writ to the party as it was before that statute to send it to the justices; and such writ could not be justified any more in the one case than the other. In all these attacks upon the court of equity, they never failed to inveigh against uses, as a crafty and illegal innovation.¹

On the other side it was alleged that writs of subpœna had issued during the times of so many chancellors, both spiritual and temporal, in the reigns of so many kings, that it must not be presumed that they acted without good authority of the king and his council, and with the

¹ These sentiments are contained in a manuscript tract of the time of Henry VIII., entitled "A Replication of a Serjeant to certain points alleged by the Student in St. Jermyn's Dialogue;" and those which follow are contained in a manuscript tract ascribed to St. Jermyn, written in answer to the supposed serjeant, and in support of what had been alleged in favor of the court of chancery. These two ancient pieces are printed in the first volume of Mr. Hargrave's Collection of Law Tracts.

knowledge of the whole realm. That it appears from reports of years and terms, that the chancellors in matters of doubt had called in the advice of the judges, who had given their sanction to the application of this writ. They alleged the stat. 17 Richard II. giving damages, and stat. 15 Henry VI. requiring sureties of the plaintiff, which were parliamentary recognitions of the authority assumed by the chancellor. And as to stat. 2 Edward III., c. 8, and stat. 20 Edward III., c. 8, they said the subpoena was always directed to the party, and not to the justices; and, therefore, when the party surceased to call upon the justices for further process, they surceased to give it him; but if it was directed to them, they need not pay obedience to the writ.

As to the objection, that giving relief in chancery contrary to the common law was setting up two laws in the kingdom, they said, that although a man shall not at common law plead payment of an obligation without writing, but in chancery he shall, yet the law in both courts, as to the right of the debt, was the same. The judges knew as well as the chancellor that a payment discharged the debt in reason and conscience; but by the maxims and customs of the law of long time used, they could not admit payment only as a sufficient plea, though they did not pretend that such maxims and customs extended to all courts. In like manner, in an action on an obligation under forty shillings in the county, hundred, or court-baron, the defendant might wage his law; and in London he might confess the deed, and pray that it might be inquired what was due upon it. So the superior courts had respectively different customs. Thus in the common pleas an outlawry might in some cases be reversed without a writ of error, but never in the king's bench: in the former court, upon the first default on a *scire facias*, execution was awarded; but in the latter, an *alias* used to issue. Why, therefore, might not certain rules hold in chancery, that did not hold in the king's bench and common pleas? Further, the chancery differs from itself in practice; for if an officer was to sue there by privilege on an obligation, payment could not be pleaded any more than in the king's bench or common pleas without writing; but the defendant must pray an injunction, and go on by bill and subpoena. It seemed, therefore, to them to be an

advantage to the subject that the rule of law should still prevail in the courts of common law; but that the court of equity in chancery should be at liberty to proceed without the restraint of it.

As to the chancellor preventing by this writ the progress of suits, which could not lawfully be done by the king, they said, the king's oath was, that "he shall grant to hold the laws and customs of the realm;" but if the laws and customs of the realm are, as well those in chancery as those at common law, as they were just shown to be, then the chancellor might administer justice by subpoena. And though the chancellor was not bound by oath to do justice, yet he was bound by conscience, and more deeply than the judges; for he must form his judgments according to the law of God or of reason, or the law of the realm, grounded upon those laws. If he erred, therefore, there was greater fault in him than in the judges; for these grounds of decision were more evident than the general maxims and some customs of the realm. For the chancellor need not meddle with the general rules of the law, nor with writs, nor with forms of pleading, which constituted the greatest difficulties of the law. They thought the reason why no writ of error lay upon a judgment given on subpoena by the chancellor might be, because the law presumed that no man could err contrary to laws so plain and evident; and if he did err, he was bound to reform it, or to make restitution, more so than the judges of the common law; for judges might sometimes give judgment against their own knowledge, but the chancellor was never bound so to do: not being bound, as they were, to any special forms of trial or proceeding.

They contended that no danger was to be apprehended from the discretion and conscience of one man, when put in contrast with the judgment of the common law; for the chancellor was always a person chosen by the king for his singular wisdom and integrity, and he was to be governed by the law of God, of reason, and of the realm, not contrary to the two former laws; and by these rules he was to order his conscience. Thus if, before the statute of wills, a man devised his land in fee, the chancellor was bound to determine this will to be void in conscience, because it was void in law. So that it was not a scrupulous or capricious determination of the chancellor's mind, but

a legal discretion dictated by the above-mentioned considerations that was to govern him in his decisions. They denied that the common law had provided sufficient redress for all injuries in the common-law courts, without the aid of conscience; and they said it was no objection to the writ of subpoena that it was not to be found in the "*Natura Brevium*," that work being defective in many other particulars; not containing the action upon the case, writ of forcible entry, and many others, which were undeniably warranted by the common law.¹

We may close what is here said of the court of equity by a passage in the life of a very eminent chancellor, who has been before named. Sir Thomas More being informed that the judges had expressed their disapprobation of the injunctions he had granted, caused a docket to be made of every injunction, and the cause of it, which he had granted while he was chancellor; and inviting all the judges to dine with him in the council-chamber at Westminster, he introduced the subject after dinner; when, upon full discussion of every one of them, the judges confessed that he could have acted no otherwise. He then offered, that if the judges of every court, to whom it more especially belonged, from their office, to reform the rigor of the law, would, upon reasonable consideration, by their discretion, and, as he thought, they were in conscience bound, mitigate and temper the rigor of the law, no more injunctions should be granted by him. To this they would make no engagement; upon which he told them, that as they themselves forced him of necessity to issue injunctions to relieve the people's injuries, they could no longer blame him. We are informed, that afterwards, in a confidential conversation, he accounted for the backwardness of the judges in the following manner: That they saw, how, by the verdict of a jury, they might transfer all difficulties and odium from themselves to the jurors, which they considered as their great defence and security; whereas the chancellor was obliged to stand alone the assault of every malignant observation.²

The court of requests began in this reign to be strengthened by a particular commission, and to rise into greater consideration than it had before enjoyed. When this new

¹ Harg. Tracts, vol. i., 337, 351.

² Rooper's Life of Sir Thomas More, 58.

authority was added to it, is not easily ascertained; it is not probable that it was before the 21st year of this king: for this court had not then acquired so much notice as to be mentioned by the book "Of the Diversity of Courts," written in that year. It is not mentioned in the treatise of St. Jermin, called "Doctor and Student," nor in any of the reports of this reign: though we find that stat. 32 Henry VIII., c. 9, punishes perjury committed there; and Lambard says, he had seen the Book of Entries belonging to this court, in a regular series from the 8th of Henry VII.¹

This court was derived from that grand source of judicature which we have so often mentioned as residing in the king, to be exercised in such cases as were not provided for in the ordinary course of justice. As some of the complaints preferred to the king were referred to the council, some to the parliament, and some to the chancery, so others, particularly petitions offered by poor persons and those of the king's household, were referred to some one or two of the council, with a bishop, some doctors of the civil and canon law, and some common lawyers, who were called *Magistri à libellis Supplicum*, or *Masters of Requests*. These persons used to hear and determine them according to their best judgment and discretion. The species of cognizance had now grown into a court of some consequence, partaking of the nature of the chancery as to its measure of decision; but still confined to the suits of poor persons, and those of the household; which qualifications were usually suggested in the bills of complaint.² In that character it subsisted for many years, till it was abolished, like others of a like equivocal nature, by parliament.³

Though Wolsey's courts fell with him, we find the king erecting several new judicatures in the like way. We have before seen that Henry had established a tribunal under the style of *The President and Council in Wales*: this was done by letters-patent, without any authority from parliament. Henry erected another court by letters-patent, called *The President and Council of the North*. After the suppression of the lesser monasteries, some disturbances and insurrections had broke out in Lincolnshire and Lancashire, under pretence of

Court of requests.

President and Council of the North.

¹ Lam. Archeion, 228.

² Ibid.

³ Namely, by stat. 16 Chas. II.

vindicating the cause of the injured churchmen; upon which Henry, in order to prevent the like commotions upon the dissolution of the remaining religious houses, which he then had in contemplation, as well as to preserve the general order and peace of the northern counties, established, in the 31st year of his reign, this new jurisdiction. This court, as it was formed after the example of the king's own council, had, like that, a general authority, not well defined; it had two commissions; one of *oyer and terminer*; another, empowering them to hold plea of real and personal actions, where either of the parties were so poor as to be unable to pursue the common course of legal redress; and the judges were to give sentence either according to the law and custom of the realm, or in an equitable way, according to their wisdom and discretion. This accommodation of a court to decide civil questions without the expense and tediousness of the common law, was conceded in compliance with the earnest request of the rebels themselves. What other authority the commissioners had used to be set forth in the commission, which generally gave them powers of superintendence and inquiry as to the police and government of that part of the country. In after-times, the commission used to be made in a general way, in order to conceal those extraordinary powers with which they were to be armed, and contained a reference to secret instructions by which they were to be directed. These concealed instructions, as they carried in them something suspicious, excited much clamor at different times against the very being of this court, and at length contributed to its dissolution.¹ There was a court called "The President and Council" erected in the west, by stat. 32 Henry VIII., c. 50, with the same authority as this in the north, and that in Wales.

Such were the courts that were now employed in the administration of justice. We shall next make a few observations on the personal actions now in use, having enlarged sufficiently on real remedies in the earlier parts of this History. The effect of covenants and agreements was a source of endless debate in the courts of law; and as personal property increased in value, all contracts concerning it became more serious

Action of covenant.

¹ Namely, by stat. 16 Chas. II.

objects of litigation. The law upon this subject was now better understood, and more fully explained, than in any of the foregoing periods. In pleading to an action founded on covenants, they had lately got into a concise way, which was not approved by some eminent judges. In 26th of the king, in an action of debt on a bond for performance of covenants in an indenture containing many covenants, the defendant had contented himself with rehearsing the condition and the indenture, and then saying generally that he had performed all the covenants. This general pleading was reprobated strongly by Englefield, Shelley, and Fitzherbert, who required he should answer specially how he had performed every one. The latter judge said this manner of pleading had obtained within the last two years; but it was a corrupt method, and he showed himself resolved to set his face against it.¹

A point of pleading was much agitated on the occasion of another action on bond for performance of covenants. The defendant pleaded that the indenture contained two covenants, which he set forth, and showed how he had performed them; he said there were other covenants, and he recited them; but he added, that he was an unlettered man, and only the first two covenants were read to him, which he had performed, as before mentioned, therefore he prayed *judgment of the action*. To this the plaintiff demurred; and the judges were equally divided upon the conclusion of the plea; Fitzherbert and Brudnell holding the conclusion to be good, while Bollard and Brooke maintained the contrary. The question was considered as turning upon this point, whether the indenture was void in the whole or in part. Those who thought it was void only in part held the conclusion of the plea to be good; for having actually sealed and delivered it, he could not plead *non est factum*, and at any rate it was his deed, as far as he assented to the contents. The other two judges said, that as only part was read to him, the whole was void; and therefore, after stating in his plea the special circumstances, he ought to have concluded, *issint non est factum*.²

The action upon the case had become so common, and it had been found so generally applicable, that it was laid down by one of the judges in this reign, that where no

¹ 26 Hen. VIII., 5.

² 14 Hen. VIII., c. 25.

other remedy was provided by the law, an action upon the case would lie.¹ Some interesting points arose upon these actions, whether they were founded on torts or contracts.

<sup>Of *assumpsit*
against executors.</sup> It was not yet settled that the *assumpsit* would lie against executors. A case of this kind happened in the 12th of the king: the testator had agreed to pay for goods, if the purchaser did not; upon this promise the goods were delivered, and now an action was brought against executors upon the promise. The report says, it was held by all the justices that the plaintiff should recover, for two reasons — first, because he had no remedy at law but by this action; secondly, because the plaintiff had delivered the goods on the promise of the testator; and as there were sufficient assets, *the testator's soul should not be put in jeopardy* by the prejudice his promise had done the plaintiff. To this was added by Fineux, chief-justice, that this did not come within the rule of *actio personalis moritur cum personâ*, which only applied to personal injuries. A quære is added by the reporter, whether, if the testator was living, this action would lie against him? or, whether he might wage his law in such a case?²

This doubt prepares us for an observation made many years afterwards upon this decision. In the 27th of the king, it was demanded of Fitzherbert, whether a man might have an action upon the case against executors for debt due by the testator, it seeming reasonable, so long as they had assets, that they should pay all the testator's debts. To this Fitzherbert answered, that he should not have this action, nor any other, for, by the death of the testator, all debts due by simple contract died also. He said he was counsel for one Clement, in the 12th year of the king, in an action upon the case against executors (the same which we have just mentioned), and that Fineux and Coningesby adjudged the action to be against the executors: But, says he, I take the law to lie clearly otherwise; and they did that without any advice, upon their own opinions merely. And when he was told that the case was reported in that year, he recommended it should be expunged from the book, for it was certainly not law.³ The learned judge does not give any reason for his opinion. An action of debt would not lie against executors for a simple contract

¹ 14 Hen. VIII., c. 31. ² 12 Hen. VIII., c. 11. ³ 27 Hen. VIII., 23.

debt, because the testator might have waged his law; and the executors not having that privilege, it was thought reasonable that they should not be liable to any action. Perhaps he thought this new-fangled action should not have greater efficacy than the ancient remedy; and that the circumstance of law-wager not lying in this action should make no difference. Whatever were his reasons, this opinion of Fitzherbert seems to have governed the courts in the remainder of this reign, for in the 37th year it was agreed that this action would not lie against executors.¹

The nature of assumpsit, and the distinction between this action and an action of debt, is a little explained by the following case:² A man had come to the wife of the keeper of the compter, and promised, if her husband would let one Tatam out of prison, he would pay the debt to her husband on such a day, if Tatam did not. She related this to her husband, who agreed to it, and discharged Tatam, and upon the money not being paid, he brought an action of assumpsit, as of a promise to himself. This evidence was objected to, as not supporting the declaration; and it was argued in arrest of judgment, that the action should be debt, and not assumpsit; but the whole court held the assumpsit to the wife to be sufficient to charge the defendant to the husband, and that the action was right. They said, that the agreement of the wife in the absence of the husband was good till he disagreed, like a feoffment to a wife, which would be good till the husband disagreed, and upon his agreement would be good forever. Most acts of the wife might be thus ratified, and made binding in law, by the husband's confirmation. As to the action, though one of the justices thought that he might have either debt or assumpsit, yet the other three were of opinion that he could not have debt, but only this action. They said, that debt would only lie where there was a contract; and in this case, as the defendant had not *quid pro quo*, the plaintiff could not have debt; but his claim was founded wholly on the assumpsit, which sounds merely in covenant; so that if there had been a specialty, he would have had a writ of covenant; but not having a specialty, he could only have his action

¹ New Cases, 7.² 27 Hen. VIII., 24.

on the case. They recollected a case which had lately been adjudged, where a person came with a man to a baker, and desired him to give the man some bread, and he would pay for it if the man did not; and a special action being brought upon this promise, it was adjudged, upon demurrer, that the action lay; and they said that debt would not lie in such case, because there was no contract between the plaintiff and defendant.¹

An idea had prevailed, as has been just observed, that the action upon the case was a sort of supplementary remedy to come in aid of such persons as could find no specific remedy among the old writs. Conformably with that idea, it was argued by the counsel in this case that as the plaintiff could have an action of debt, he ought by no means to be supported in this new writ: but the whole court denied this, and it was said by one of the judges that a person might choose which of two remedies he would rather pursue. Thus, if a person bailed goods to another, and they were destroyed or spoiled, he might have his election between an action of detinue and one on the case. It should seem from this reasoning, as well as from the case just mentioned, that though this was a remedy peculiarly adapted to special cases, grounded on *express* promises, yet it had become the practice to bring this action for the recovery of simple contract debts, by stating the debt to arise upon a promise to pay, and then, when a debt was proved, construing such legal debt to *imply* a legal promise. When the validity of such actions, grounded only upon *implied* promises, was agitated in a subsequent reign, many records of this and an earlier period were produced, to show that it was no new device; but these precedents all passed *sub silentio*; for there is no mention made of any such in our books, unless the following may be considered as such: for in the 33d of Henry VIII., in an action upon the case, on an assumpsit to pay £10, the defendant pleaded that he had waged his law in an action of debt for the same sum; and this was held a good bar.² We find another action on the case, for that the defendant promised to pay £10 which he owed to him for a horse and cow.³

¹ 27 Hen. VIII., 24.

² New Cases, 5. *Vide* S. P., 2 Rich. III., fol. 14.

³ 33 Hen. VIII. New Cases, 5.

To return to special actions of assumpsit. We find in the thirty-fourth of the king an action of assumpsit on an insurance of a ship: the declaration was, that whereas the plaintiff was possessed of certain wine and other merchandise in a ship, the defendant promised for £10 to satisfy the plaintiff in £100 if the ship and goods did not arrive safe. Besides the form of action, which is alone to our present purpose, it may be remarked that this action laid the goods, etc., to be in the parish of St. Dunstan's in the East in London; and though in truth the bargain was made beyond sea, yet they held it well; for in such an action as this, which was not local, the place was declared to be immaterial.¹ There appears an action on the case, for that the plaintiff had delivered goods to the defendant, and the defendant had *promised* for ten shillings to keep them safe, but did not.² This seems to be another novel action of assumpsit.

Among actions upon the case for torts, we find the following: In an action for a nuisance in stopping a river, so as to make it rise on the neighboring grounds, it was objected that the proper remedy was by assize of nuisance, and not by this action; and the whole court laid down this distinction: That where a man's way is stopped entirely, so as no passage remains, there the remedy is by assize; but where only part is stopped, so that one may pass with difficulty, there it is by action upon the case.³ If a nuisance was in the king's highway, and was, therefore, a public nuisance, yet every one who received any particular damage therefrom might still have his action on the case.⁴ Where an action was brought for words, in calling the plaintiff *heretic*, and one of *the new learning*, it was held clearly that it would not lie, being merely a spiritual matter; for if the defendant was disposed to justify and show in what respect the plaintiff was a heretic, the temporal court could not judge of it; and it was not like where the court had cognizance of the principal matter, as where a man was called traitor or felon. Again, if he had called him *adulterer*, this being a spiritual matter, an action would not lie for it. But Fitzherbert said that where things were of a mixed nature, as where a man was said to keep a *bawdy-house*, he

¹ 34 Hen. VIII. New Cases, 7.

² 26 Hen. VIII. New Cases, 4.

³ 14 Hen. VIII., 31.

⁴ 27 Hen. VIII., 27.

might elect whether he would have his action here or in the spiritual court. They added, that if an indictment of heresy was found before any temporal judge, all he could do would be to certify it to the bishop.¹ Though a defendant was allowed to justify, and say that the charge was *true*, it was not enough to say that it was the common report that he was a *thief*.²

If there was any doubt whether an action of *assumpsit* used at this time to be brought on *implied* promises, upon a buying and selling, instead of the action of debt, there is none that an action had lately been framed to supply the place of that of *detinue*; for we find more than one instance of such during this reign. Perhaps that just mentioned, where the defendant had promised *of trove*, for ten shillings to keep the plaintiff's goods safe, might be reckoned as one instance; for in the old law that would have been a proper subject of *detinue*. But those which seem to carry a stronger affinity to the action of *detinue* were grounded, not upon a *promise*, but a *tort*; and the declaration made much the same suggestion as that in *detinue*. Thus one of them charges "that the defendant *found* the goods of the plaintiff, and delivered them to persons unknown:" another—"that whereas the plaintiff was possessed of certain goods, the defendant *found* them, and converted them to his own use."³ Another was, "that the goods of the plaintiff came to the hands⁴ of the defendant, and he wasted them."⁵ In this manner did the action upon the case, in one shape or other, spread itself over many of the old writs; and as it had now become applicable to the most usual calls for legal inquiry, by being substituted in the place of debt and *detinue*, it grew every day more common.

The style of pleading in actions upon the case continued much the same as in the former period. It was most usual to deny that part of the declaration which *led* to the charge on the defendant; and sometimes the plea stopped there; at other times they would add a denial of the charge itself, by way of conclusion. This will appear from the following instances:—First, of *assumpsit*. In an action which

¹ 27 Hen. VIII., 14.

² 26 Hen. VIII., 9; 27 Hen. VIII., 22.

³ 33 Hen. VIII. New Cases, 6.

⁴ *Devenērunt ad manus*.

⁵ 34 Hen. VIII. New Cases, 6.

has been before mentioned, on the defendant's promise for ten shillings to keep safely goods delivered to him by the plaintiff, it was held by Fitzherbert and Shelley that *non habuit ex deliberatione* was a good plea.¹ Again, in an action, for that the defendant promised to pay £10 to the plaintiff, which he owed to him for a horse that he bought of him, the plea might be, which sum he hath paid to the plaintiff *absq. hoc*, that he promised to pay £10 which he owed to the plaintiff for a horse; or *absq. hoc*, that he owed £10 to the plaintiff for a horse.² This latter form of a traverse confirms the idea that they considered the *owing* and the *promising* to pay as the same thing; and that where the *owing* was disproved, the promise was likewise. In an action charging that the goods of the plaintiff came to the hands of the defendant, and he wasted them; the defendant pleaded "that they did not come to his hands," and it was held good; upon which the defendant gave in evidence that they were not the plaintiff's goods.³

In an action for shaving *cum novaculâ immundâ et insalubri*, the defendant pleaded that he did not shave the plaintiff *cum novaculâ immundâ et insalubri modo et formâ*. In another, for not taking care of a horse, the defendant pleaded in the words of the declaration, that he did serve the horse well and with care, *absque hoc*, that he served it negligently and improvidently in the form the plaintiff had alleged. Again, for not curing a horse, the farrier pleaded, that *non manucepit*, he did not undertake to cure it. For negligently keeping his fire, the defendant pleaded, *quod ipse ingem suum prædictum salvè et securè custodivit, absque hoc*, that he kept it so carelessly and negligently that his neighbor's house was burnt for want of his care.⁴

Sometimes they would take the allegations of the declaration by protestation, and then conclude with a kind of general issue: as, in an action for destroying a bond entrusted to the defendant to redeliver on request, the defendant, *protesting* that he redelivered it unbroken and untorn, for plea said, that he was in nowise guilty of the breaking and tearing of the writing obligatory.⁵ Thus were pleas in case conceived upon the principle of a justi-

¹ 26 Hen. VII. New Cases, 4.

² 33 Hen. VIII. Ibid., 5.

³ 34 Hen. VIII. Ibid., 6.

⁴ Rastell's Entries, 3, 26, 426, 8.

⁵ Rastell's Entries, 7.

fication, in the way of a trespass-pleading; and it was only by a traverse, if ever, that the conclusion was pointed into something like a full denial of the matter charged, and had the effect of a general issue. It was an option in the defendant in most actions, whether he would plead the general issue of *not guilty*, or *non assumpsit*, as the case might be.

The action of debt continued in its former state, except that it was broken in upon and superseded by the action of assumpsit, as has already been shown. In the old law, this action was held a sort of *divisum imperium* over contracts with the action of accompit, which also in like manner with the former lost ground in proportion as the assumpsit grew more into fashion. The principal inducement to recur to the assumpsit instead of these writs, was to preclude the defendant from his wager of law; when, therefore, a transaction was so circumstanced that the law would not allow this privilege, there was no reason for going out of the ancient track; and if the case was such as to be within the compass of those remedies, it was still usual to bring debt and accompit.

It therefore sometimes happened as formerly, that a question would arise, whether debt or accompit was the proper remedy in the matter in question? A case of this kind happened in the 28th of the king, which furnished such topics as will give a very good idea of the distinction then made between these two actions. A. had signed and sealed a *bill* acknowledging he had received a sum of money to lay out at Rouen in French prunes, and see them safely shipped. Upon this, an action of debt was brought against the executors of A., alleging that the money was not laid out in prunes; a verdict was found against the defendant; and though it was alleged, in arrest of judgment, that the proper remedy was accompit, and not debt, yet judgment was given, and a writ of error being brought, the same point was argued in the king's bench, when the judgment was affirmed, with the concurrence of Fitzjames, Portman, and Spilman, against Luke. The reasons upon which the dissenting judge supported his opinion were these: He said, that where money was bailed for the buying of merchandise, it was clear, if the money was not laid out, that the action should be accompit; both, for the money and the profit

Debt and
accompit.

that had been, or might have been made by detaining the money; for he was a receiver and accountable, and no action of debt lay without a contract. Thus, says he, if I become debtor to you for the debt of *T. S.*, this does not make me liable to an action of debt, for it is *nudum pactum*. So if I bail to you £20 to bail to *B.*; here *B.*, for the same reason, cannot have an action of debt against you. However, it might be questioned whether the *bill* would change the nature of the accompt into a matter of debt; but he thought not, though he admitted the force of some common cases: as where a horse was sold, and the vendee made an obligation for the money, there the nature of the contract was determined, because he was bound to pay the money according to the *obligatory words* in the bond; or where a judgment was recovered; for there the contract was gone, being changed into a thing of a higher nature. He admitted all this; but he said this was a different case, for there were in this *bill* no *obligatory words*, nor anything that purported to be an obligation; but the bill was merely a proof and testimony of the accompt; and *non est factum* would be no plea, as the action was founded upon the receipt to render accompt, and not upon the bill. He quoted a similar case in the time of Henry VI., where a man brought an action of debt upon a contract before the Mayor and Recorder of London: the defendant there tendered his law; the plaintiff said it was the custom of London, that if a man put his seal to a paper, testifying a contract, he should be ousted of his law-wager; upon which the defendant demurred, whether the plaintiff had not by this plea abated his own action; and it was adjudged by the whole court that this well maintained the action, and did not alter the nature of the contract, but was only a proof and testimony of the contract. He admitted, in the case at bar that, if the bill had gone on, and said, "if I fail in laying out the money, it shall be redelivered to the plaintiff," the word "redeliver" would have amounted to something obligatory, as had been adjudged in the time of Edward IV. But he thought this bill, as it had no obligatory words, was only a proof of the contract, and did not change the nature of it from accompt to debt.

The justices who were of a contrary opinion argued in this way. They said, that admitting there was no bill

testifying the receipt, yet by the opinion of all the books, it was in the election of the bailor to have debt or accompt in such case. They said, it was ruled in the time of Edward III., that if money was bailed to another on condition that on the bailee making assurance of certain land by such a day, he should retain the money forever; but on not doing so, he should redeliver it; if the condition was not performed, he was either accountable, or a debtor at the election of the bailor. It must be the same, if money was given to merchandise with, or to bail over, as to give in alms; the money in such cases is the bailor's, till it is given according to the trust; and he may countermand the gift, and have debt for the money. But Fitzjames thought, in this case, the property of the money was in the bailee till it vested in the bailor, by the non-performance of the trust. They said further, that if money was bailed to one to keep for the use of the bailor, and it was not contained in a bag or box, *detinue* would not lie, because the money could not be distinguished; but the party might have debt or accompt. They said, if plate was bailed to a person, and he altered it, the bailor might have either *detinue* or an action upon the case. They mentioned this to have been decided in the time of Edward IV. And in the time of Frowike, Chief-Justice, they said the following point was argued and ruled. A man bought twenty quarters of corn, to be delivered at such a time and place; the vendor did not perform the contract, so that the vendee, being a brewer, was obliged to buy corn elsewhere at a greater price. It was ruled, that the vendee might have his action upon the case, and also debt, for the corn; but not *detinue*, because the property could not be known; so that they thought, in the present case, it was very reasonable that the plaintiff should have his option of two actions.

As to the bill, and the form of it, they said, that if it was in these words, "this bill witnesseth that *A.* borrowed £10 of *B.*," without anything more, this would charge the executors the same as an obligation, and the testator would not have been permitted to wage his law against it. Any memorandum of owing money, or of an accompt or an acknowledgment of a balance due, if sealed and delivered as a deed, would be a good obligation in law. Every man's deed was to be taken most strongly against himself.

They thought that, in this case, the plaintiff could not have accompt against the executors, because they were not privy to the transaction, and that debt was the proper remedy. They therefore affirmed the judgment; and an injunction which had been obtained in chancery was likewise dissolved; so that this matter was, in one shape, or other, determined in three courts.¹

We have frequently observed, that in debt, detinue, and accompt, the defendant was allowed his law-wager in certain circumstances, but not in others (*a*). How this stood at present, and the manner of pleading in these actions, is worthy of notice; because we shall see afterwards that this consideration had great influence in settling the method of pleading in the new actions upon the case that were substituted in their stead. It was laid down, almost in the same way as the law had been understood for several years, that in detinue on a bailment by the hands of another, the defendant might wage his law, *because* he shall not answer to the bailment, but only to the detinue: the same in debt upon a contract by the hands of another; though it would² be otherwise in accompt by the hands of another: and the reason they admitted this difference in accompt was, because the receipt might be traversed; from which we are to collect, that it could not in the two former actions.³ Again, Fitzherbert laid down this difference: where a man came to the possession of goods by bailment, and where by *trover* or finding. In the first case, he was chargeable by force of the bailment only; and if he bailed them over, or they were taken from him, yet he was still chargeable to his bailor by virtue of the bailment. But if he came to them by *trover*, he was only chargeable on his possession; and if he was lawfully out of possession of them before he who had right brought his action, he was not chargeable. For this reason, in detinue grounded upon a bailment, it would be a good plea for the defendant to say he found the goods and delivered them to *J. S.* before the action brought; and he might

(*a*) Wager of law, it will be observed, was in effect denial of a debt on oath; for it led to such perjury, that, in the reign of Elizabeth, the courts encouraged a new form of actions in order to get rid of it; and, in the meantime, they did all they could to restrain it.

¹ 28 Hen. VIII. Dyer, 20, 118.

³ 18 Hen. VIII., 3.

² *Vide ante*.

traverse the bailment. Though Shelley did not quite assent to this conclusion, yet he agreed with him that in many cases the bailment was traversable in detinue; and he added, that the *trover* also was traversable in some cases: but this was denied by Fitzherbert.¹ On another occasion it was laid down by the same learned judge, that in accpt, on receipt by his own hands, even though a deed was shown testifying the receipt, yet the defendant should be admitted to wage his law: the same in detinue; for notwithstanding the bailment was by deed, yet the detinue is the cause of action.² To reconcile what is here said of detinue with what was laid down by Fitzherbert before, he must be supposed to mean here a bailment by the hands of another; and that this, though proved by a deed, might yet be discharged by wager of law, because he was, according to what is here said, only to answer to the detinue. These rules will be found to govern the pleading in the new actions upon the case, which have just been mentioned as coming in the place of detinue and debt.

The alterations made by statute in the criminal law during this reign were very many and very important: the determinations of the courts may be comprised in a smaller compass. There are some which are worthy of observation.

The principle which governed the parliament in the beginning of Edward III.'s reign,³ when they declared it unlawful to kill an outlaw, seems to have had no influence with that assembly in a similar case at this time. In 24 Henry VIII.⁴ it was agreed in parliament, that it was not felony to kill a man attainted in a præmunire; for, says the report, such a one is out of the king's protection, which is the same as if he was out of the realm and government of the king; though it would be otherwise of one attainted of felony.

A man was arraigned upon an indictment for murder: upon the trial, the jury found him not guilty of the murder, but guilty of homicide or manslaughter; and the judgment given in the king's bench was, that he should be hanged. Another case of the same kind was determined in the same way by all the judges. The reason given by the report is, that manslaughter is comprehended in murder.⁵ From this one should be led

¹ 27 Hen. VIII., 13.

² Ibid., 22.

³ Vide vol. iii.

⁴ Bro. Cor., 197.

⁵ Bro. Cor., 222.

to conclude, that the precise meaning of murder, as distinguished from other killing, was not yet defined; nor indeed did there seem to be any direction by which a line could be drawn, till stat. 23 Henry VIII. had taken away clergy from *murder with malice prepense*; the form of which expression seems to intimate that there might be a murder without malice prepense. It is certain that, after this act, murder was more exactly defined as to its legal import; though the distinction plainly marked out by this statute was not observed by the courts for some time, as we shall again see in the reign of Queen Mary.

If many persons were concerned in the commission of an unlawful act, and a murder was committed by one, all were construed to be principals in the fact. Thus, if twelve or more went to do a robbery, make a riot, affray, or the like, and one of them entered into a house and killed a man, the others were all principals in the murder. Such was the case of the Lord Dacres, who (together with Mantel and others) was executed because one of the company killed a man as they were hunting together.¹ It was held that if a man was killed in joisting, or in play with sword and buckler, it was felony, notwithstanding it had been at the command of the king.²

It had been agreed by the justices of both benches that, in an appeal of murder, the defendant should not be permitted to plead that the deceased assaulted him, and that he killed him *se defendendo*; but should plead not guilty, and give the special circumstances in evidence; and if it appeared so to the jury, they should acquit him. Nor was he allowed to have this plea, with a traverse of the murder, for the matter of the plea was murder (says the book); murder could not be justified, and the traverse could not stand when the inducement to it failed.³ The way, therefore, was to plead the general issue. A question had arisen upon stat. 31 Henry VIII., which made it high treason to poison any one. A woman had poisoned her husband, and the heir brought an appeal of murder. It was contended that the lesser offence was merged in the greater, and therefore that an appeal would not lie; and so it was held by the court.⁴

Some questions arose on the nature of larceny. In the

¹ Keilw., 161. 34 Hen. VIII. Bro. Cor., 171.

² Bro. Cor., 228.

³ New Cases, 21.

⁴ 31 Hen. VIII., Dyer, 30, 4.

18th year of the king, it was propounded by the chancellor to all the justices, whether, if a man took peacocks, that were tame and domestic animals, it was felony. The opinion of Fitzherbert and Englefield was, that it was no felony, because they were *feræ naturæ* as much as doves in a dove-house; and if the young of such doves were taken, it was no felony. The same of herons taken out of the nest; of swans, bucks, hinds, which were domesticated, or hares taken out of a garden surrounded with a wall; the same of a mastiff, hound, or spaniel, of goshawk reclaimed, for they were more for pleasure than profit, which was the case with a peacock. They agreed that fruit taken from a tree, or the cutting of trees or corn, was not felony, though it would be different if they were before severed. However, Fitzjames and the other judges were of opinion that peacocks were of the same nature with hens, capons, geese, or ducks, of which the owner had property, they having *animum revertendi*, unlike fowls of warren, as pheasants, partridges, and conies, of which it is clear no felony could be committed; so that it was at length agreed that felony might be committed of peacocks.¹ A question arose upon the stat. 21 Henry VIII., c. 7, concerning servants embezzling their master's goods. It was asked, if a person delivered an obligation to his servant to receive the money due upon it, and the servant received and went away with it, converting it to his own use, whether this was within the meaning of the statute; and it was thought not, because no goods were delivered, an obligation not being a valuable thing, but a chose in action. And Englefield said, if a person delivered to his apprentice wares or merchandise to sell, and he sold them, and went away with the money, this was not within the statute, because he had the money by the delivery of his master, nor did he go away with the thing delivered to him. Yet if one of my servants delivers my goods to another of my servants, this shall be considered as my delivery; and if he goes off with them, it is within the statute. And Fitzherbert seems to have doubted whether obligations might not be considered as goods within the act; for a gift of *omnia bona et catalla* would pass all obligations.²

If the practice of justices of the peace was agreeable

¹ 18 Hen. VIII., 2.

² 26 Hen. VIII. Dyer, 5, 2.

to what was laid down for law in our courts, they must have been of very little use in assisting towards bringing offenders to justice. Upon a justification under the warrant of a justice, in the 14th of the king, it was said by Fitzherbert that a justice of the peace could not make a warrant to take a man for felony, unless he was before indicted. Brudnell, the chief-justice, assented to this, but said he might make a warrant for keeping the peace.

Brooke said that the justice could not even take one for suspicion of felony, unless upon a suspicion of his own, much less could he make a warrant for that purpose, But they all agreed in holding the officer justified; for a justice, being a judge of record, and having a seal of office, the bailiff was not to dispute his authority, but give obedience to the command of the warrant and execute it.¹ After all, it should seem that a warrant for the peace, which the judges here pronounced to be lawful, might, without any strained fiction be issued against felons, and answer all the purpose of apprehending for felony.

The old debate upon the locality of trial was not yet quieted. A man died in the county of Cambridge of a stroke he had received in another Of trials in two counties. county, and the heir brought an appeal in the county of Cambridge. The court of king's bench were of opinion that the jury should come from both counties, according to a case in the time of Henry VII. Upon this, it was observed by the clerks, that if a man died in London of a stroke received in Middlesex, the trial, according to common practice, was by a jury of Middlesex. The court said that was a different case, because London and Middlesex could not join.² In these cases no *nisi prius* used to be awarded; but the jurors of both counties were obliged to come up to the king's bench. A similar question had arisen, a few years before, in an appeal for a robbery. The robbery was laid in Wiltshire and the procurement and abetting in London; the appeal was brought in Wiltshire against the accessories, and it was objected to for that reason. After much argument on both sides, the opinion of the court was, that the appeal should abate. They laid it down as an established point of law, that where

¹ 14 Hen. VIII., 16.

² 32 Hen. VIII. Dyer, 46, 8.

the tort commenced, there the action should be brought. They admitted that where goods were taken feloniously in one county, and carried into another, the appeal might be in either, because the property was never divested out of the possessor; but it was otherwise where goods were so taken by a trespasser, for there the property was in the trespasser by the taking, and divested out of the owner; so that the action must be in the first county, where the trespass was alone committed. They put the case of a stroke in one county and the death in another; but said that in this case there could not be a trial in both counties, because those of London could not join with foreigners, as had been laid down in the former case.¹ The offence of the accessory was therefore considered so separate and distinct from the other, that he was to be proceeded against where he committed his crime.

The above were instances of joining juries of different counties, where an appeal was brought, and the issue was to be tried. But we find it laid down generally, that not only an appeal, but an indictment might be brought in either county, where the goods were stolen in one county and carried into another,² upon the ground of its being a felony in both counties. The above case of the accessory, where a difficulty certainly remained, and the other points of stealing and killing in two counties, which were not settled in the mind of every lawyer, occasioned an act in the next reign which has directed how trials should be had in such cases in future.

While the king and parliament were engaged in destroying the pope's authority, the jurisdiction and practice of the ecclesiastical court was not less questioned by all ranks of persons (a). The proceed-

The ecclesiastical court.

(a) The subject of the jurisdiction of the ecclesiastical courts is of importance with reference to its very wide range, and the probable results of its exercise upon the great movement against the ancient religious system, and also on account of its connection with the great question of the boundaries between temporal and spiritual jurisdiction. The jurisdiction of these courts might be divided into what were its more proper and primary objects—spiritual correction (a jurisdiction exercised, as was said, *pro salute animæ*, as the proper episcopal jurisdiction), and certain mixed matters, the cognizance of which had been annexed to these courts by ancient usage, and were evidently anomalous, such as matters of testament, legacies, etc.

¹ 29 Hen. VIII., 38, 50.

² 34 Hen. VIII. New Cases, p. 73.

ings for heresy were carried on with such zeal as to be open to much odium; and the course in which those

The former, however, came necessarily, by reason of the establishment of the church, to include some matters of a mixed nature, as tithes, mortuaries, etc.; and there was the important subject of matrimony, which by the law of the land was a contract, and by the law of the church a sacrament, and came under both jurisdictions, and often occasioned conflicts of jurisdiction; but the original primary and proper subjects of the ecclesiastical jurisdiction were in their nature purely spiritual, as heresy, or such injuries or offences as were not cognizable by the courts of law, as used to be the case with slander, and continued still to be the case with a large class of slanders, such as were not entertained by the courts of law, by reason of there being no imputation of a crime punishable by law, or no special damage resulting from the slander. Such, then, was the general nature and scope of the ecclesiastical jurisdiction, which primarily and properly was confined to what was purely spiritual. The principle was upheld, that where the exercise of jurisdiction by the ecclesiastical courts would interfere with or encroach upon the jurisdiction of the courts of law, it was not to be allowed; and so in the last reign it was held that if indictments in felony were prefixed, they could not be sued for it in the spiritual courts, for it arose upon a temporal cause; and it was thought that indirectly the effect of allowing the ecclesiastical courts cognizance would be to enable them to enforce temporal rights, or give remedies for temporal wrongs (13 *Hen. VII.*, *Keilw.*, 39). It was a moot-point apparently whether a pecuniary penalty imposed by the spiritual court for slander could be imposed for slander (12 *Hen. VII.*, 24; *Bro. Abr.*, *Prohibition*, fol. 19), for the matter, it was said, was spiritual, although the pecuniary penalty was temporal. Suits in the ecclesiastical court were of two kinds, either *pro salute animæ, vel reformatione morum*, as for defamation, or where the plaintiff had an interest and property in the thing in demand, as suits for tithes, legacies, contracts of matrimony, or the like (*Cooke's Case*, 5 *Coke's Reps.*, 51). Pastors could sue in the spiritual courts for slander or oral defamation of character, in imputing offences detrimental to moral character, though not cognizable in courts of law, as in calling a woman a whore (*Ibid.*). But in cases where the imputation was of a crime cognizable in the courts of law, it was doubtful whether the suit could be in the spiritual court. But for calling a man a heretic, for which no action would lie, a party could sue in the spiritual court (27 *Hen. VIII.*, 14). So the spiritual court entertained cognizance of suits as to church-rates (*Jeffrey's Case*, 5 *Coke*, 67), or as to neglect of incumbents in discharge of their duties as to divine service, etc. (*William's Case*, 5 *Coke*, 73). With regard to defamation not suable at law, it was of ecclesiastical cognizance. A citation was laid in the spiritual court against a *feme sole* for slander, and the libel was partly proved; upon which the court awarded the party a certain sum for his costs and for the defamation; and then a citation was sued by her executor to satisfy the same to the party; and upon that there was a prohibition issued, and now a consultation was prayed, and, after long debate among the judges, was awarded, on the ground that defamation was altogether a spiritual offence, which could not elsewhere be punished than in the spiritual court; and it followed that when they proceeded upon it and gave judgment, it was still a spiritual judgment, there being no debt or duty demandable before at the common law, and also the offence could not be properly compensated but by money (12 *Hen. VII.*, fol. 24). The chief-justice, however, in delivering the judgment of the court, laid it down, that even in a case where the matter was spiritual, if the spiritual court proceeded to judgment on anything temporal, prohibition would be granted. And in divers cases,

matters were conducted was thereby more exposed to observation and censure. The branch of the ecclesiastical

where the thing was spiritual, and even the persons spiritual, still prohibition might be granted, as where one was sued in the spiritual court for breach of faith, where he was to pay a certain sum (*i. e.*, as it is implied by a contract), the court could grant prohibition, because it was a debt or duty which was a temporal thing demandable by the common law, with which it was not for the spiritual courts to intermeddle. And so where the thing was spiritual, and the judgment upon it, and where one party was spiritual and the other temporal, prohibition might be granted; as if a parson sued the farmer (or termor) of another person, and a right of tithes, which he claimed to be the right of his own church, there prohibition should be granted. All the judges agreed that slander was in its nature a spiritual offence, and the only doubt was, whether, when the spiritual court accorded a sum of money by way of compensation, it did not cease on that account to be a spiritual matter. In the result it was held that it did not. The law upon that part, however, of the words became changed in this way, that when the slander imported a temporal damage, as where it involved a temporal offence, it was cognizable in the courts of common law, and though still it did not necessarily follow that in all cases in which those courts had cognizance, the ecclesiastical courts ceased to have jurisdiction, yet, as a general rule, it was so. In the latter part of the reign of Henry VIII. an action on the case was brought, for that the defendant had called the plaintiff a "heretic, and one of the new learning." It was objected, that the action would not lie, for that it was spiritual matter. And the court held clearly that it would not lie, for it was merely spiritual, and if the defendant should justify that the plaintiff was a heretic, and show in what point, they could not discuss it, nor determine whether it was heresy or not. If it was, an accusation of an offence they could judge of, as treason or felony, it would be otherwise; but as to spiritual offences, such as heresy or adultery, it was not, and although in some cases, it was added, the matter was of a double character, and was punishable by both laws, by the spiritual and the temporal, as keeping brothels, etc. (*Year-Book*, 27 *Hen. VIII.*, fol. 14). With regard to defamation, the rule of the spiritual courts was, in the opinion of many, more sensible than that which was adopted by the courts of common law when they first assumed jurisdiction in such cases. The courts of law then laid down the rule that they would only entertain suits for verbal or oral slander, when either there was an imputation of a crime punishable by law, or misconduct in a trade or profession, and special damage therefrom; but spiritual courts would punish for any defamation, that is, any imputation injurious to character. The courts of law by degrees relaxed their own rule, and as they only allowed the ecclesiastical courts jurisdiction where the common law courts had not, this, in some cases, caused a fluctuation of opinion as to jurisdiction. Thus, in the course of this reign, it was held that if a man said of another that he kept a bawdy-house, the other could sue him for it in the spiritual court, even though he might have an action at law for it, as the spiritual courts had a concurrent jurisdiction (27 *Hen. VIII.*, fol. 14; *Cro. Eliz.*, 643). But it was afterwards held that an action would lie at common law (*Park*, 379), as the party might be indicted for it. It was, however, laid down in the ensuing reign, that defamation was not cognizable in the spiritual court, unless it concerned matter of merely ecclesiastical cognizance, as, for calling the plaintiff an adulterer, heretic, schismatic, etc.; and that if it related to matter determinable at common law, no suit would lie in the spiritual courts (4 *Coke's Reps.*, 20). If a man published any heresy or erroneous opinion in religion, for this he would only be cited

practice which was viewed with most jealousy was the proceeding *ex officio*. This method of prosecution was

before the ecclesiastical courts, as such matters did not pertain to the cognizance of the temporal courts (12 *Coke's Reps.*, 43). So as to excommunication, it was entirely a matter of spiritual cognizance (*Ibid.*); and although the king's court could issue a writ to the bishop to dissolve an excommunication where it was contrary to law, because interfering with the course of law, the king's court had no power to deal with the sentence. The exercise of the jurisdiction by the ecclesiastical courts as to erroneous opinions in religion was often extremely vexatious, to say nothing of their jurisdiction in cases of immorality not cognizable by law. Upon this subject it is proper to mention a case which arose in the reign of Henry VII., which is reported in the Year-Books of that reign. In an action of false imprisonments, the defendant pleaded that in the act of 4 Henry IV., it was enacted that "if any one should be accused of heresy, or should hold any opinion contrary to the laws of holy church, the bishop of the diocese should arrest him, and safely keep him until he could make his purgation or abjuration within three months next after the arrest." And it was alleged that the law of holy church is that each parishioner ought to pay his tithes to his curate, and that the plaintiff was residing in the parish of St. Dunstan's, and that notice came to the Bishop of London, the diocesan, that he had said that he was not bound to pay his tithes to his curate, upon which he was accused, by reason of which the bishop ordered the defendants to arrest him, which they did, and committed him to the care of the bishop, but he escaped within the three months. The plea was objected to on several grounds, the most serious of which seemed to be that it was so rapid, and that no authority appeared for the accusation, "no presentment, nor process, nor summons to the party, nor opportunity of defence, nor any authority for the arrest beyond mere word of mouth," no writ or writing. It was urged that the intention of the statute was, that if a man was detected in or accused of any heresy, or of anything contrary to the faith, the bishop could arrest him; and before the statute they had no other power than to make process against the party by citation; and that the intention of the statute was not that the bishop should arrest any one who held any opinion contrary to their constitutions; and in this case it might be that what the man said was right, for the pope might have granted him a dispensation from payment of tithes. It was argued on the other hand, that the statute was not only as to heresy, but as to holding any opinion contrary to the laws or constitutions of the church, and that as there was a constitution of the Council of Lateran that tithes should be paid by every one to his curate, the opinion of the plaintiff that he was not bound to do so was against that constitution, and so came within the statute (*Year-Book*, 10 *Hen. VII.*, fol. 18). It does not appear how the case ended, but the bare fact that a man could be summarily arrested and imprisoned on mere *ex parte* accusation, and on a mere verbal authority from one who never saw or examined him, and that it should be contended in a court of law, and apparently with some color of ground, that it was lawful, speak volumes as to the vexatious and oppressive character of this ecclesiastical jurisdiction, and it will be found that under the Tudor dynasty, in little more than a century, the pressure of it had helped greatly to estrange the nation from the ancient faith and the ancient church. In the last reign it was well settled that the king's courts had the ecclesiastical courts entirely under their control, so that in this respect the royal supremacy was thoroughly established, that is, in the sense of a supremacy over all courts, temporal or mixed with temporality, for it was laid down that if prohibition issued from the king's court to the spiritual court, and

considered by the common lawyers in no better light than an abuse of all law and justice. It was, on the other hand, defended by the authority of prescription, and upon grounds of expediency. These topics were very fully discussed in print by persons of ability and eminence. The chief of those who entered into this controversy were St. Jermyn and Sir Thomas More; the former carrying on the attack, whilst the latter defended the established order of proceeding.

On the one hand, it was complained that persons were brought before the spiritual judge for heresy, without knowing who had accused them, and were thereupon obliged, sometimes to abjure, sometimes to do penance, or pay great sums for redemption thereof; all which grievances were ascribed wholly to the judge and officers of the court, who were the only persons visible to the parties suffering. It was contended to be a heavy oppression

notwithstanding the party was there suspended or excommunicated, process should issue to the bishop to absolve him, and if he refused, then compulsory and penal process (*Year-Book*, 13 *Hen. VII.*, fol. 11; *Bro. Abr.*, *Prohibitions*, fol. 25). And as the king's courts were absolute before the establishment of the royal supremacy in restraining the jurisdiction of the ecclesiastical courts, so after the royal supremacy the king's commissions were absolute in determining appeals from this tribunal. In cases within this jurisdiction, however, the king had all the power the pope had (*Grendon v. Bishop of Lincoln*, *Plowden*). At common law, as seen in the *Year-Books* of the last reign, the pope had the supreme appellate jurisdiction in all cases in the ecclesiastical courts in which they were not restrained by prohibition (1 *Hen. VII.*, fol. 3). After the statutes of 25 Henry VIII., establishing the royal supremacy, it was in the power of the crown in all cases within the jurisdiction of the ecclesiastical courts to issue commissions of delegacy (just as the pope had done before) to hear and rehear appeals from the metropolitan courts, and thus, although the statute said that the crown might appoint a commission of delegates to hear an appeal, whose decision should be final, it was held nevertheless that the crown might issue another commission of delegacy to rehear the case, for that the crown had an absolute power to issue civil commissions, and it was not expressly limited by the act (*Gervis v. Halliwell*, *Cro. Eliz.*, 571). It was resolved by all the judges in the next reign that before the statute of Elizabeth (1 *Eliz.*, c. 1), expressly giving power to the crown to appoint a court of high commission to hear ecclesiastical cases, the crown might have granted a commission to hear and determine such cases (*Cawdray's Case*, 5 *Coke's Reps.*; *Case of High Commission*, 12 *Coke's Reps.*). This, no doubt, was true as to the time after the statute of 25 Henry VIII., though not as to any previous period; for no instance can be found of any such commissions issued by the crown prior to that act, which established the royal supremacy; and it has been shown in the introductory note to this reign that no such supremacy in spiritual matters existed at common law. But the courts of law could restrain the ecclesiastical courts within their jurisdiction, that is, to matters spiritual.

that a person, brought *ex officio* before the ordinary under suspicion of heresy, should be compelled to purge himself at the will of the ordinary, or be accursed; which was in a manner inflicting a punishment without proof or without an offence.

In answer to this it was urged, that if convening heretics *ex officio* was no longer to be practised, and no course was to be taken but that of a formal accusation, it could not be expected that prosecutions should ever be made for heresy. Many, said they, will give secret information to a judge, who would not dare to stand forth as parties to accuse; and, if brought against their wills as witnesses, would readily enough give evidence: this might be observed not only in heresy, but in felonies, and other crimes. They adduced instances from the practice of the common law, equally hard on an innocent person, and similar with this proceeding. How often, says Sir Thomas More, do the judges upon suspicion award a writ to inquire of what fame and behavior a man is in his country, who lies in the meantime in prison till the return? If he be returned good, that is, if he be in a manner purged, then he is delivered on paying his fees; if he is returned naught, then he is bound to his good abearing. The same where a man was indicted, and no evidence was given openly at the bar, as many times happened; for the indictors might have evidence given apart, or might have heard of the fact before they came there; and of whom they heard it they were not bound to disclose, but rather to conceal, being sworn to keep the king's counsel, and their own. In such case, who is to tell the prisoner the names of his accusers, to entitle him to his writ of conspiracy? It is in vain to say that the indictors were his accusers, and them he knew, for he could have no redress against them for his undeserved vexation. And if it was said, that the proceeding of these twelve men, without open accusers, was less liable to exception than that of a single judge, the learned chancellor answers, that in his experience he never saw the day but he would as well trust the truth of one judge as of two juries. He thought it therefore a right conduct in judges, without any open information, but merely on general rumor or secret intimation, to bind, as they frequently did, a troublesome man to his good abearing. And he says himself, that he,

while chancellor, had often put persons out of the commission of the peace on secret information.

Upon the whole, when it is considered that heresy was the first offence given in charge at every session of the peace and of jail-delivery, and in every leet throughout the realm, and no prosecutions are there instituted, it seemed probable, that without some secret proceeding like that *ex officio*, the crime would go entirely without punishment.¹

Such were the arguments for and against this point of ecclesiastical jurisprudence, which, notwithstanding all opposition and animadversion, continued to maintain its ground.

Henry VIII. was a man of some learning, and discovered no small degree of industry on subjects where he had much interested himself: this appears by his book against Luther, of which it is generally agreed he was the author. He gave some attention to business. The preamble and material parts of the bill for empowering him to erect the new bishoprics were drawn by the king himself; and the first draught of it is still extant in his own hand. There are likewise some minutes of his relative to the bishoprics he then had in contemplation to erect.²

Through the whole of this prince's reign, he seems to have enjoyed the full gratification of his absolute will and caprice. A concurrence of events had produced a state of things which enabled him, beyond the example of any of his predecessors, to tyrannize over all ranks of men, and over the laws themselves; or, when that was not safe, to cause such laws to be made as would warrant and legitimate every act of power.

Though the parliaments of this king were obedient to his commands in most points, yet in the article of taxation he sometimes met with disappointment. In consideration, perhaps, of their numberless other compliances, the king endured this with patience; never failing to try all means of keeping on good terms with an assembly which he was generally able to make the instrument of his designs.

In the 14th year of his reign he issued privy-seals

¹ Sir Tho. More's Works, 907, 995, 1012.

² Burn. Ref., vol. i., 250.

demanding loans. He carried this scheme of arbitrary taxation still further; he published an edict for a general tax, which, however, he still called a loan; and, under that pretence, levied 5s. in the pound on the clergy, and 2s. on the laity. In the same year, when a parliament had been called, and they had made him a grant payable in four years, he would not content himself with the terms the legislature had prescribed, but levied the whole in one year.¹

Not content with this, about two years after, he issued commissions into every county for levying 4s. on the clergy, and 3s. 4d. on the laity. But finding some resistance to this attempt, he thought it advisable to send letters to every county, declaring that he meant no force by this imposition, and that he would take nothing but by way of *benevolence*. Meanwhile the courtiers ventured to contend that the statute of Richard III. against benevolences, as it was made by an usurper and a factious parliament, could not bind an absolute monarch who held his throne by hereditary right. The judges went so far as to affirm that the king might exact, by commission, any sum he pleased.²

When doctrines like these were propagated from authority, the king was encouraged in renewing at different times these arbitrary taxes. The House of Commons were so far from remonstrating that they twice passed acts for the remission of debts which the king had contracted by these loans, in the last of which they inserted a clause requiring that such as had already obtained payment, in the whole or in part, should refund to the exchequer.³

Notwithstanding this injustice, he succeeded the same year in soliciting new loans. Besides this, he enhanced the price of gold and silver, under pretence that it should not be exported; he coined base money, and appointed commissioners to levy a benevolence, which was by no means unfruitful. An alderman of London, not contributing according to the expectations of the commissioners, was enrolled as a foot-soldier for the Scottish war; others were imprisoned: so that the king, by his prerogative, exercised an absolute control over the persons and property of all his subjects.⁴

¹ Hume, vol. iv., 46, 48.² *Ibid.*, 61.³ *Ibid.*, 243.⁴ *Ibid.*, 245.

All this was owing to the tameness or ignorance of parliament: overawed by the firmness of Henry, unacquainted with the extent of their privileges, and the principles of the constitution, they were unable to afford the people any protection. The following is an instance how little notion they had of a legal government. The duty of tonnage and poundage had been voted to former kings for life; but Henry levied it six years without any renewal of that grant to himself, and though four parliaments had sat during that time, none of them complained of this as an infringement; on the contrary, when they passed stat. 6 Henry VIII., c. 14, to give this tax to the king for life, they complain that he had sustained losses by those who had *defrauded* him of it.¹

In the same way must we account for that extraordinary statute by which the parliament ordained that the king's proclamations should have the force of laws.² To secure the execution of this act, another³ was afterwards made, appointing that any nine counsellors should form a legal court for punishing all disobedience to proclamations. By these two statutes the king was, in effect, made absolute, and maintained in his own person completely the legislative and executive power of the state.

The authority given by stat. 28 Henry VIII., c. 17, may be reckoned among the singular aggrandizements of royal authority in this reign. That statute enabled any one inheritable to the crown, as limited by Henry VIII., to repeal after his age of twenty-four years, all statutes to which he had consented before that age.

This reign affords many instances of extraordinary power exercised as well by subjects as by the king. In the 9th year of his reign, the king procured from the pope the legatine commission for Wolsey, with the power of visiting all the clergy and monasteries, and that of suspending all the laws of the church during a twelvemonth.⁴ This was a great authority, and Wolsey, to secure the execution of it, established an office, which he called the *Legatine Court*. This new court exercised certain censorial powers, not only over the clergy, but also over the laity. It inquired into matters of conscience, into causes of public scandal, into conduct which, though out of the reach of

¹ Hume, vol. iv., 272.

² Stat. 31 Hen. VIII., c. 8.

³ Stat. 34 Hen. VIII., c. 23.

⁴ Hume, vol. iv., 15.

the law, was contrary to sound morals. The cardinal went further, and assumed the jurisdiction of all the bishop's courts, particularly that over wills and testaments; he also presented to priories and benefices, disregarding all rights, whether of election or patronage.

The courts of law gave the first blow to these great powers. Allen, an instrument of the cardinal, who used to sit as judge in this court, was convicted of malversation, and the legate thenceforward thought proper to be more cautious in displaying his judicial authority.

The new appointment of Vicar-General, conferred on Cromwell some years after, delegated to that officer the king's whole authority over the church, as supreme head thereof. This, though not so extensive as that exercised by Wolsey, and in the hands too of a more discreet man, was yet a very eminent station; and being created for the purpose of making rigorous inquisition into the state of the religious houses, gave Cromwell an unlimited sway. At one time he published, in the king's name, an ordinance, retrenching many gainful superstitions, abrogating many of the popish holidays, ordering incumbents of parish churches to set apart a considerable portion of their incomes for repairs, for maintaining exhibitioners at the university, and the poor;¹ all which he did without the sanction of parliament or convocation.

As if every consideration and every article of life was to depend on arbitrary will, the king had appointed a commission, consisting of two archbishops, several bishops, and some doctors of divinity, to choose, among the variety of tenets then promiscuously held, a form of religion for the kingdom. These commissioners had not made much progress in their undertaking when the parliament, in 1541, made an act, ratifying all the opinions which they should *thereafter agree upon with the king's assent*; provided only that they established nothing contrary to the laws and statutes of the realm.²

If Henry was regardless of law in elevating and maintaining his ministers in extraordinary authority, he was equally void of justice in animadverting on them. Wolsey, by exercising his legatine authority, had incurred the statute of *præmunire*. Though this was by the procure-

¹ Hume, vol. iv., 170.

² *Ibid.*, 222.

ment of the king himself, and had been acquiesced in by the parliament and nation for some years, he did not scruple to suffer a sentence of præmunire to pass on the cardinal, but executed part of it very readily, almost in person, by taking possession of his immense property in houses, furniture, and other valuables.¹ The king went further; he pretended the whole church had incurred the same penalty by submitting to this papal authority; and the attorney-general had begun to proceed against them formally by indictment. To avert the king's resentment, they voted him a great sum of money, made *their humble submission* to him, acknowledged him to be the protector and supreme head of the church and clergy of England, and for these condescensions obtained a pardon.²

The House of Commons now grew apprehensive that they also should be obliged to purchase a pardon for their submission to the legatine authority. They therefore petitioned the king for a remission of this offence to his lay subjects; and some time after, a general pardon was issued for all the laity.³

Thus did the king himself encourage and promote a breach of the law, and afterwards turn the delinquency of his subjects to his own emolument.

Henry was not contented with this sovereign dominion over law and justice; he attempted to govern impossibilities, and reconcile the plainest absurdities, by means of the omnipotence of parliament. It being thought proper to make some alteration in the oath against the pope's authority, certain oaths were devised, more comprehensive and precise, to be taken in future; and by the same stat. 35 Henry VIII., c. 1, it is provided that they who have already sworn the former oaths, or any of them, *shall take and esteem it of the same effect and force* as though they had sworn this: thus the taking of one oath is made by act of parliament equivalent to the taking of another. In the second act of succession, stat. 28 Henry VIII., c. 7, s. 24, there is a repeal of the former act of succession; and the oath taken under it was now to be dispensed with. The following words were, therefore, added to the new oath: "*And in case any other oath be made, or hath been made by you to any person, that then ye are to repute the same as vain*

¹ Hume, vol. iv., 94.

² Ibid., 106.

³ Ibid., 107.

and annihilate." The like clause was added to the oath in which the pope's authority was renounced, which was ordained by stat. 28 Henry VIII., c. 10, and the like was inserted in the second oath above alluded to, for renouncing the pope's authority.

If we are to judge of the general administration of criminal law in this reign from the trials that have come down to us of eminent persons, it appears that the lives of the people were entirely in the hands of the crown. A trial seems to have been nothing more than a formal method of signifying the will of the prince, and of displaying his power to gratify it. The late new-invented treasons, as they were large in their conception, and of an insidious import, by giving a scope to the uncandid mode of inquiry then practised, enlarged the powers of oppression beyond all bounds.

The case of Sir Thomas More is a strong instance how little anxiety there was to establish a capital charge by plausible proofs, and the little probability there could be of escaping conviction. It had been made treason to endeavor to deprive the king of his titles: the title of Head of the Church had been conferred on him by parliament; so that a denial of that title was treason under the new statute. After an imprisonment of near fifteen months, Sir Thomas was brought to a trial for this offence. The indictment was so long, and charged such a variety of matter, he said he could not remember a third part of what was objected against him. They then proceeded to proofs. His examination in the Tower by certain lords was considered as evidence sufficient to support the charge, though it amounted to nothing more than a refusal to answer or discuss such questions as concerned the king's or pope's supremacy: nor was it till after he had entered on his defence that Mr. Rich (afterwards Lord Rich) and some others were examined *viva voce*. Upon such evidence he was convicted, to the entire satisfaction of the chancellor, who presided, and who emphatically expressed his approbation of the verdict in the words of the famous Jewish magistrate, *Quid adhuc desideramus testimonium, reus est mortis*.¹

The only charge against Anna Boleyn which was supported with the least degree of proof was, "that she had

¹ Stat. Tri., vol. i.

affirmed to her minions that the king never had her heart; and that she had said to each of them apart that she loved him better than any person whatsoever." This was held *a slandering of the king's issue begotten between the king and her*, one of the new-made treasons, and, what is very remarkable, designed originally for the protection of her own character and of that of her progeny.¹

Lord Surrey was indicted of treason. We are ignorant what was the tenor of the indictment, but the evidence against him was, that he entertained some Italians in his house who were *suspected* to be spies: that a servant of his had made a visit to Cardinal Pole, in Italy; and that he had also quartered the arms of Edward the Confessor; one of which was thought sufficient evidence of his keeping up a correspondence with that obnoxious prelate; the other was judged an indication of his aspiring to the crown, though he and his ancestors, during the course of many years, had done the same, and were justified in it by the authority of the heralds. Such were the facts upon which this accomplished nobleman was convicted by a jury, and was accordingly executed.²

In the criminal prosecutions of these times there are two things worthy of observation: first, the slight facts which were considered as proofs of a charge; secondly, the slight evidence which was allowed to establish those facts — an observation which may be made as well upon proceedings at common law as upon the more decisive way of condemning persons in parliament.

The favorite way of proceeding against state criminals was by bill of attainder. This extraordinary judgment was resorted to according to the occasion, either to confirm a sentence already passed in some court of law, or to ensure the destruction of such as might possibly escape by the openness of a common-law trial. Thus the sentence against Empsom and Dudley, upon a flimsy charge of treason, was confirmed by bill of attainder, as was that against the Marquis of Exeter, the Lords Montacute, Darcy, Hussy, and others, who had all been formally tried. These, as they succeeded a regular trial and condemnation at law, were not so exceptionable as the attainders of Sir Thomas More and Bishop Fisher for misprision

¹ Hume, vol. iv., 159.

² Ibid., 214.

of treason, which, perhaps because a case that did not extend to life, they ventured on without the examination of witnesses, or hearing them in their defence. On the other hand, in a capital case, the Maid of Kent and her accomplices were all examined in the Star Chamber, though not in parliament, before the bill of attainder passed upon them.¹ This examination of witnesses in the Star Chamber was probably in order to try the strength of the evidence, and to determine in what way to proceed, though we do not find that the result of such examination was always laid before parliament, to enable them to form a judgment on the propriety of that to which they were called upon to assent. The privy councillors had taken their resolution, and if they were satisfied, the houses seldom concerned themselves as to any further inquiry.

The attainders in parliament which we have hitherto mentioned were carried through with moderation and justice, compared with those which followed. In the 29th year of his reign, Henry introduced a new practice of attainting persons. The Countess of Salisbury had become extremely obnoxious to him, on account of her son, Cardinal Pole, and nothing was more desired by Henry than to take her off. Various accusations were framed against her, that she hindered the reading of the new translation among her tenants; that she procured bulls from Rome, which were said to be found in her house; and that she kept up a treasonable correspondence with her son. These charges, however, could not be sufficiently proved, might be invalidated by her, or would not reach her life. This determined the king to procure her destruction in a more decisive and summary way than had been hitherto used. For that purpose he sent Cromwell to consult the judges, whether the parliament could attain persons who were forthcoming without trial, or citing them to appear and defend themselves.² The judges answered that it was a dangerous question, that the high court of parliament ought to give the example to inferior courts of proceeding according to justice; no inferior court could act in that arbitrary manner, and they thought the parliament never would. But being required to give a more explicit answer, they said that if a person was attainted in that manner, the attainder could

¹ Burn. Ref, vol. i., 146.

² Hume, vol. iv., 198.

never afterwards be brought in question, but must remain good in law. As Henry did not want his judges to determine how just, but only how effectual, this proceeding, so conducted, would be, he was satisfied with their answer, and resolved to avail himself of it against the Countess.

A bill was brought into the House of Lords to attain her of treason. The only thing like proof before the parliament was, that Cromwell showed to the House a banner, on one side of which were embroidered the five wounds of Christ, the symbol chosen by the northern rebels; on the other side, the arms of England; which banner he said was found in the house of the Countess. This was considered as an evidence of her approving that rebellion.

Fifteen others were attainted in the same act; some of them, who were friars, for saying, "that venomous serpent the Bishop of Rome was supreme head of the Church of England;" others for treason in general, no particular fact being specified. There is no appearance that witnesses were examined against any of them; if they were, it probably passed in the Star Chamber, for none are mentioned in the journals. The haste with which this famous bill passed, is not, of all circumstances attending it, the least remarkable; it was brought in the 10th of May, was read that day the first and second time, and the third next day. In the same year, the abbots of Reading, Colchester, and Glastonbury were, in like manner, attainted of treason by bill.¹

After the precedent had been introduced, they went on through the whole of this reign attainting persons in a summary general way: the number of which attainders it would be tedious and disgusting to recount.² The most striking instance of these was, when this engine of tyranny was directed against the man who, from his devoted attachment to Henry, first brought it into use. Cromwell, in the next year, was attainted by bill, without trial, examination, or evidence. The Duke of Norfolk was, in the latter end of this reign, attainted in the like manner.

Numerous as were the attainders for treason, both by bill and by common-law proceedings, these did not shed so much blood as condemnations for heresy. The kind of

¹ Burn. Ref., vol., 342.

² Ibid., 343, where many are mentioned.

execution for this offence is in itself so horrible, and such scenes were so often repeated, that it would be irksome, as well as beside the purpose of this work, to do anything more than just to allude to them. The statutes lately made respecting religion and the king's supremacy, had laid so many snares both for Protestants and Romanists, that death seemed to present itself on all sides. The miserable condition of the people can hardly be better described than in the observation of a foreigner at that time, who remarked, "that those who were against the pope were burnt, and those who were for him were hanged."

It is more to our purpose to observe, that among the pains inflicted on the unhappy sufferers for religion, there are two remarkable instances Torture. where *torture* was used. We are told, that the elegant and good Sir Thomas More was so inflamed with religious bigotry, as to send for, to his own house, a Mr. Bainham, a gentleman of the Temple, who favored the new opinions; and because he refused to discover others who agreed with him in his religious sentiments, the chancellor ordered him to be whipped in his presence; he afterwards sent him to the Tower, and there he himself saw him put to the torture (a).¹

It is also related,² that the Chancellor Wriothesley, having examined Anne Ascue with regard to the patrons she had at court, and she, refusing to betray them, he ordered her to be put to the torture, which was executed in a very barbarous manner: he stood by it while it was performing, and ordered the lieutenant of the Tower to stretch the rack farther; but he refused, notwithstanding the chancel-

(a) It is strange that the author should credit such a story against such a man as More, upon no better authority than Burnet or Fox, for Hume cites no better, and either could only speak to hearsay. Fox was much nearer the time than Burnet; and what his authority is worth, this may show. In a case in the reign of James I., Coke cited a case where Parson Puck, in a sermon, recited a story out of "Fox's Martyrology," that one Greenwood, being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas, in truth, he never was so plagued, and was himself present at the sermon; and he therefore brought his action upon the case for calling him a perjured person, etc., (*Brook v. Montague*, Cro. Jac., 91). As to the story about Wriothesley, though it rests on no better authority than that of Fox, it is hardly worth while entering into any question concerning the acts of such a man, who was capable of any degree of cruelty or servility, and betrayed the noble More to death.

¹ Hume, vol. iv., 132.

² Fox, vol. ii., 578.

lor's menaces; who, upon that, put his own hands to the rack, and stretched it so violently, that he almost drew her body asunder.¹

Long and barbarous imprisonment was among the sufferings of unhappy delinquents. We are told that the aged prelate Bishop Fisher, being stripped of his bishopric and every species of property, was confined in prison above a twelvemonth, with scarcely rags enough to cover his nakedness.²

We shall now consider the legal documents of this reign; the first of which are the statutes. The statutes began in this reign to assume a different appearance from that which they had before borne, but such as they have continued in ever since. This difference consisted as well in the language and style, as in the form of them. We have before seen, that all the acts of one session were strung together as chapters of one statute, with one general title prefixed to the whole; but in the fifth year of this king it first became the custom to put a distinct title to every particular chapter of the statute.³

A remarkable circumstance of the statutes of Henry VIII. is the prodigious length to which they run. The first of these long statutes is stat. 21 Henry VIII., c. 5, concerning the probate of wills; and from that period, the legislature seem invariably to have indulged themselves in the same prolixity. To this they were perhaps tempted by the subjects which came under their consideration, and which required very multifarious provisions; such as the Reformation, the succession, the poor laws, the revenue, and other matters (*a*). Whatever was the

(a) It may be convenient here to notice the statute 22 Henry VIII., c. xv., passed as to the repair of bridges, and the statute of sewers, both of which have been omitted by our author. By the common law, declared by the statute 22 Henry VIII., c. xv., and the subsequent bridge acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to the repair of the highway at the ends of such. The inhabitants of a county are bound by common law to repair bridges erected over such waters only as answer the description of *flumen vel cursus aquæ*. Bridges must be repaired by the county when it does not appear who else ought to repair them (*Rex v. W. R. Yorkshire*, 5 Burr., 2594; 2 *W. Black.*, 685; *Lofft*, 238; 2 *East*, 342). The county is bound to repair a bridge built by a private person, if it be of public utility (*Ibid.*). But, if he has the benefit of it, he must repair (*Ibid.*). Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county is bound to repair it (*Ibid.*). See 22 Henry VIII., c. v.; 5 William and Mary, c. xi;

¹ Hume, vol. iv., 158.

² *Ibid.*, 138.

³ *Ibid.*, 138.

object of parliamentary regulation, was still treated with the same abundance of provisions and profusion of words. The great motive to this new manner of drawing statutes seems to have been an extreme anxiety that the meaning of the parliament should be intelligible and clear, beyond all possibility of question or cavil. To effect this, an act was stuffed with numerous clauses; and the whole compass of language was ransacked for expressions to define and fix the precise intention of each.

1 Anne, s. 1, c. xviii.; 12 George II., c. xxix.; 14 George II., c. xxxiii.; 43 George III., c. lix.; 52 George III., c. cx.; 55 George III., c. cxliii. A hundred may be charged by prescription with the reparation of a bridge, and this, although it appears that by a statute within the time of legal memory, one of the townships, parcel of the Hundred, was then annexed to it (*Rex v. Oswestry*, 6 M. & S., 361). A parish may be indicted for non-repair of a bridge, without stating any other ground of liability than immemorial usage (*Rex v. Hendon*, 4 B. & Adol., 628). Though there cannot be a bridge which the county is bound to repair, where there is no *cursus aquæ*, yet it is a question of fact in each case (*Rex v. Whitney*, 3 Adol. & Ellis, 69; *Rex v. Orfordshire*, 1 B. & Adol., 289). By the 23 Henry VIII., c. v., made perpetual by 8 and 4 Elizabeth, c. i., and 13 Elizabeth, c. ix., commissions of sewers were to issue into all parts of the realm, whenever need should require, directed to substantial persons nominated by the Lord Chancellor. These commissioners were to make and maintain laws and assessments, etc. All laws, ordinances, etc., without being certified into chancery, were to remain in force until repealed (13 Eliz., c. ix.). The commissioners were to have an absolute authority to act according to their discretion; but this, it was held, must be limited by the rule of reason and of law (*Keighley's Case*, 10 Co., 501). The commissioners might make rates to reimburse charges (*Case of the Earl of Hull*, 2 Stra., 1127). One brought a writ upon the case, for that the plaintiff had used a certain highway from his house to a close, that is to say, a royal highway, to carry and recarry, pass and repass, and that the defendant stopped the highway, so that the plaintiff could not go as he was wont, to his injury and damage. It was objected, that an action would not lie for stoppage of the highway, for that the king had the punishment of it; and it should be presented in the leet, when it should be redressed, for that it is a common nuisance to all the liege subjects of the king; and that, therefore, there was no reason why a private particular person should have action upon it; for by the same cause every other person might have an action for it, and the party would be punished a hundred times for the same cause. But it was said, that though it was true that a nuisance done in the highway might be redressed in the leet, and not by action, unless it was where a man had greater injury or inconvenience by it than every other man had, in which case he could have an action for the recovery of damages by reason of this special injury; as if a man dug a trench in the highway, and I fell into it in the night. So it was said here; for the plaintiff had more convenience by this highway than any other man; and then when it was stopped, he had greater damage, for that he had no way to his close, and therefore he could have an action for that special matter (27 Hen. VIII., 27). The principle thus plainly laid down was upheld in the reign of Elizabeth (*Fineux v. Hovenden*, Cro. Eliz., 664), and was followed by a series of cases down to the present time (*Paine v. Patrick*, Carth., 193; *Chichester v. Lethbridges*, Wilkes, 74; *Rose v. Miles*, 4 M. & S., 101).

An act was generally introduced with a long and emphatical preamble, opening the occasion and object of it, by enumerating the evils and their proposed remedies. These preambles, though before in use, were now much fuller than formerly. The enacting clause was conceived with a view to cover every possible case; and by a series of expressions, of a similar or synonymous import to obviate every pretence to elude it. Lest this should not completely attain the aim of the parliament, several provisos, qualifications, and exceptions were added, to mark out distinctly the direction the act should take.

As this considerably increased the length of statutes, it also rendered them verbose, perplexed, and tedious. The sense, involved in repetitions, is pursued with pain, and almost escapes the reader; while he is retarded and made giddy by a continual recurrence of the same form of words in the same endless period.¹ This solicitude to ensure their meaning has in some instances carried the parliament so far as to heap one proviso upon another, and sometimes to insert the same clause twice over.² Not content with the aid derived from a multiplicity of words and from repetitions, to prevent misconstructions, the parliament, in one statute, upon a subject of a delicate nature, added the following remarkable clause: "And be it finally enacted, by the authority aforesaid, That the present act, and every clause, article, and sentence comprised in the same, shall be taken and accepted *according to the plain words and sentences therein contained*, and shall not be interpreted nor expounded by color of any pretence or cause, or by any subtle arguments, inventions, or reasons, to the hindrance, disturbance, or derogation of this act, or any part thereof; any thing or things, act or acts of parliament heretofore made, or hereafter to be had, done, or made, to the contrary thereof, notwithstanding: and that every act, statute, law, provision, thing and things, heretofore had or made, or hereafter to be had, done, or made, contrary to the effect of this statute, shall be void, and of no value nor force:"³ a clause, which is at once an instance of the concern and jealousy

¹ Vide a strong instance of this in sect. 17 of stat. 25 Hen. VIII., c. 21.

² Vide sect. 8 and 34 of stat. 21 Hen. VIII., c. 13; and sect. 91 and 123 of stat. 34 and 35 Hen. VIII., c. 26.

³ Stat. 28 Hen. VIII., c. 7, sect. 28.

felt by the parliament on this subject, and an example of that legislative language which we have been just remarking.

That this wordy style is of use in subjects which require legal precision is evinced from its being adopted much about the same time in deeds of conveyance, where we find the like tediousness of phraseology, and a similar multiplicity of covenants and provisos. The same peculiarity of language has continued ever since in both.

With all this precision in wording the contents of an act, they seemed to pay no attention to the title, but to abandon that to chance or ignorance to prefix; the title seldom conveying any idea of the design or contents of the statute, and often being grossly incorrect.

The reports of this reign are contained in the Year-Books and in Dyer, with some scattered cases in Keilway, Jenkins, Moore, and Benloe, and, towards the end of the reign, in Leonard. Of the Year-Book. The Year-Book is a very scanty one, compared with those which went before, owing probably to persons being no longer encouraged with a stated appointment to execute this task. It contains only the 12th, 13th, 14th, 18th, 19th, 26th, and 27th years; and there ends this famous collection of reports called the Year-Books.

Perhaps, since a taste for all kinds of learning had begun to prevail, the opinion of this establishment of reporters was altered, and it was thought more advisable to trust to the general inclination discovered in private persons to take notes; who, probably from a competition, would do more towards rendering this department perfect and useful than any temptation from a fixed salary: whatever might be the reason, such a stipend was no longer continued, and the undertaking dropped.

However, we find no want of reporters. These began now to multiply; and very soon, if not in this reign, furnished altogether a greater variety of cases than used to be taken on the former plan. As there would thenceforward have been no reports if gentlemen in the profession had not made them, either for their own use or with design to publish, a certain diligence and attention began to be paid to this new exercise of ability; and the business of reporting opened a new field to the studious for the display of accuracy, judgment, and learning. From this

period there will be seen to follow a train of writers of this kind, of various characters and merit, to whom we are obliged for carrying on the written annals of the law down to the present time. There is one thing common to all those of this period, that they followed the language in which their predecessors had written, and published their reports in the law-French.

The law received great improvement from the many treatises and useful collections published in this reign. These, by digesting the learning of the law, at once gave a polish to the rude materials furnished by former ages, and rendered the knowledge of them more easily attainable. The publications of this reign may be divided into such as were produced by writers of this period, and such as were written in former reigns, and were now for the first time put to the press. We shall pursue these two classes of publications according to the course of time, that the progress made in improving the stock of legal learning may be distinctly perceived. Every addition in these times to the lawyer's library is an object of curiosity.

The most distinguished writer upon law in this reign is Anthony Fitzherbert, first a serjeant, and
Fitzherbert.
some years after a judge of the common pleas.

The first book published by this learned author was his "Grand Abridgment," printed in 1514 by Richard Pynson.¹ So useful a work soon required another supply. In 1516 a second edition was printed by Wynkyn de Worde, or perhaps this is one of the books that were printed for him abroad, where the law-French was better understood, and where, for that reason, many of our law-books used to be printed.² In 1534 he published his new "Natura Brevium," which was reprinted in 1537.³ Several books were printed in this reign on the office and duty of a justice of peace. The first was in 1515, in which year we find two works printed by different printers, under the title of "The Boke of Justices of Peas."⁴ In 1534 there appeared another work, entitled, "The Boke for a Justyce

¹ It is collected from John Rastell's preface to the *Liber Assisarum et Placitorum Coronæ*, that he had some hand in the publication of this Abridgment. It was printed in three volumes, in folio; and the price of it, and of the next edition in 1516, was forty shillings.

² Typog. Antiq., 154, 260.

³ Ibid., 423, 429.

⁴ Ibid.

of Peace never so well and diligently set forth." All these were without any name. Afterwards, in 1541, we find "The New Booke of Justyces of Peace, made by Anthony Fitzherbert, Judge, lately translated out of Frenche into Englishe."¹ These are all the writings that are known to belong to Fitzherbert upon the law of England; several anonymous tracts, which will be mentioned in their proper places, have been attributed to him, though upon no sufficient authority.

Saint Germain is an author who gained considerable note in this reign by his famous book entitled "Doctor and Student." The first dialogue of Saint Germain. this work came out in 1518, in Latin, with the following title, "Dialogus de Fundamentis Legum Angliæ et de Conscientiâ." The second dialogue was printed in English in 1530; and the next year there appeared a translation of the first dialogue. Both afterwards passed several editions, under the title of "Doctor and Student."² This author's writings upon the comparative rights of the ecclesiastical and temporal powers will be mentioned in another place.

Of the foregoing performances, the "Abridgment" and "Natura Brevium" of Fitzherbert, and the "Doctor and Student," are the most distinguished. The "Abridgment" is a work of singular learning and utility. If the date of Statham's publication could be ascertained to be antecedent to this, many reflections might be founded on the comparative excellence of the present work: it might then be said to be formed on that of Statham; that Statham's was the commonplace-book of the time, and as such furnished a basis on which the superstructure of Fitzherbert's more enlarged and improved work was raised; that the experience of a few years pointed out the defects of the former, and enabled Fitzherbert to make the necessary corrections. The foundation for these observations being very uncertain, we can only remark that the latter work is five times the size of the former; that it contains the cases as low down as the time of its publication; that these are abstracted more fully, and convey the sense of the book more satisfactorily; otherwise, the order of Statham's work in the titles seems to be followed, and the cases seem to be

¹ Typog. Antiq., 554.

² Ibid., 333, 379.

arranged with the same disregard to method and connection. This "Abridgment" was a valuable acquisition to the lawyers of this period, but was superseded by the "Abridgment" of Sir Robert Brooke in after-times. The latter abridger had the advantage of his predecessor in possessing many Year-Books which he had never seen. The original cases, on the other hand, of the reigns of Richard II., Edward II., Edward I., and Henry III., which are to be found only in Fitzherbert, preserve to this work a reputation entirely its own. Several in other reigns, and particularly about his own time, are not taken from any book we have; so that Fitzherbert's, though in general an abridgment, is also in many parts an original work.

Fitzherbert's "*Natura Brevium*," like his other performance, is an improvement of a more ancient work of the same nature and title. It is remarkable that this treatise on the nature and effect of the principal writs in the Register was published at a time when those writs were, many of them, going into disuse, and soon afterwards became obsolete, so that hardly nine parts in ten of this work make a portion of our present law.

The form and style of these two works have all the dryness of professional treatises. The "Doctor and Student" is a production of a different cast. It consists of two dialogues between a doctor of divinity and a student of the common law. These contain discussions on the grounds of our law; and where objections had been stated to some of its rules and maxims, it is endeavored to reconcile them with reason and good conscience. The whole is treated in a popular way, with the freedom and language of conversation, conveying, by means of objections and their answers, not an unsatisfactory account of many principles and points of the common law.

Among the law writers of this reign are to be reckoned

Rastell. John Rastell, the printer and lawyer, and his son, William Rastell, the lawyer and printer.

The former was bred a printer, and though he did not take to the practice of the law, yet it evidently appears from his works that he had been a diligent student; the latter, though educated for the bar, and a practiser, succeeded to his father's occupation, which he seems to have united with his profession, till the honors of the latter at length called upon him to decline it altogether. John Rastell translated

from the French the "Abridgment of the Statutes prior to the time of Henry VII.," mentioned before.¹ He also abridged those of Henry VII., and down to the 23d and 24th of this reign, which were printed together by the son William in 1533. This was the first abridgment in the English language; and it is introduced by the author with a long preface, recommending the printing of law-books in English, and ascribing great praise to Henry VII. for first directing the statutes to be made in the mother tongue. To this writer are ascribed two other books, "Les Termes de la Ley," and "The Tables to Fitzherbert's Abridgment." The title of authorship has, however, been disputed with respect to these two works, which have by some been given to the son William. As to "Les Termes de la Ley," it was ascribed to John by Bale; but it is omitted by Pitts in his account of him, and peremptorily denied to be his by Wood, who as positively attributes it to William. That was Lord Coke's opinion; but Bishop Tanner again restores it to John. Perhaps it may be giving to each his distinct merit, if we suppose that John composed the original work in French, and that William made the translation, which was printed by him, and was never doubted to be his.²

The tables to Fitzherbert's Abridgment were first printed in 1517; the translation of the Abridgment of the Statutes in 1519, and again in 1527; "Les Termes de la Ley"³ in 1527.⁴

To William Rastell is ascribed a tract called "The Char-tulary," printed in 1534; but there seems no pretence for this supposition, and the work is no more than the tract which had before been printed under the title of "Carta

¹ *Vide ante.*

² According to Wood, William was but nineteen years old, and only two years' standing in the university, when this book was first printed. It is remarkable, that in the reprint of the proem prefixed to the translation, William introduces a sentence that was not in the first edition, expressing that he first wrote that book in French, and then translated it into English. If the above date is correct, the assertion of William may perhaps be suspected. Typ. Antiq., 331.

³ This was the title given to the work by William; but when first published by John it bore the following title: *Expositiones Terminorum Legum Anglorum, et Natura Brevium, cum diversis Casibus, Regulis, et Fundamentis Legum tam de Libris Magistri Littletoni quam de aliis Legum Libris collectis, et breviter compilatis pro Juvenibus valde necessariis*; but, though the title was in Latin, the work was in French. Typ. Antiq., 331, 474.

⁴ Typ. Antiq., 326, etc.

Fœdi simplicis." How far he was author of the "*Termes de la Ley*" has just been considered. He made a table to Fitzherbert's "*New Natura Brevium*," and another of the pleas of the crown. The tables to Fitzherbert's *Abridgment*, which are ascribed by some to him, are the same probably that were before made by his father, and were reprinted by William. The performances, therefore, which most distinguish William Rastell, belong to a later period than this reign; these are his "*Collection of English Statutes*," printed in 1559; and his "*Entries*," printed long after his death, in 1596.¹

As valuable a performance as any, perhaps, of this reign, is Perkyns's "*Profitable Boke*" on the learning of conveyancing. This was first printed in 1532, with the following title: "*Incipit perutilis Tractatus Magistri Jo. Parkins interioris Templi Socii*," etc. This book is in French.²

Besides the writings of the above authors, several books made their appearance in this reign without a name, or any intimation to what name they belonged, though some of them have been ascribed to certain of the writers already mentioned. The earliest of these anonymous publications is the "*Intrationum Liber*," which was printed by Pynson in 1510.³ In 1516 were published, by the same printer, the book called "*Modus tenendi Curiam Baronis cum Visu Franciplegii*," the "*Retorna Brevium*," the "*Modus tenendi unum Hundredum, sive Curiam de Record*;"⁴ in 1525, the "*Diversite de Courtz et lour Jurisdictiones et alia necessaria et utilia*," attributed by some to Fitzherbert, and the "*Articuli ad Narrationes Novas partim formati*." In the year 1527 was printed the book usually called "*Carta Fœdi*;" the title of it was, "*Parvus Libellus continens Formam multarum Rerum*;" and then "*Carta Fœdi simplicis cum Literâ attornatoriâ*" is the head-title of the first article in the book, and so gave it afterwards that name. This is a book of precedents of feoffments, releases, and other conveyances, and was frequently reprinted

¹ Typ. Antiq., 473, 474.

² Lord Coke has been very incorrect in assigning the date of several of the early printed works on our law; but he is unusually so when, speaking of this, he says, "Perkins, a little treatise of certain titles of the common laws, wittily and learnedly composed, and published in the reign of King Edward the Sixth." Pref. to 10 Rep. Typ. Antiq., 390.

³ Typ. Antiq., 255.

⁴ Ibid., 260.

in this reign, sometimes under the title of "The Chartulary," and by some is attributed to William Rastell.¹ In 1540 there came out a book entitled, "The principal Laws and Customs and Statutes of England which be at this present day in use."² In 1543 there appeared a book upon the offices of sheriffs, bailiffs of liberties, escheators, constables, and coroners.³ At the close of this reign, in 1546, there appeared "A Booke of Presidentes, exactly written in maner of a Register, and shewing howe to make al maner of Evidences and Instrumentes." And of the same date⁴ another, entitled, "Institutions or principal Grounds of the Laws and Statutes of England;"⁵ and another, in 1547, under the title of "The Attorney's Academy."⁶

Most of the foregoing works were repeatedly printed by different printers in the course of this reign, and many of them were translated into English. Some of them were collected and published together. We find, in 1534, the following pieces were published by Rastell, in one quarto volume: "Natura Brevium," "The Olde Tenures," "Littleton's Tenures," "The New Talys," "The Articles upon the New Talys," "Diversitie of Courtes," "Justice of Peace," "The Chartulary," "Court Baron," "Court of Hundrede," "Retorna Brevium," "The Ordynauce for takynge of Fees in the Exchequer." In his preface to this publication, addressed to the students of the law, he says, that persons began to study the law with reading "Natura Brevium," "The Old Tenures," and "Littleton's Tenures."⁷

In the year 1544 another collection was printed by Berthelet, containing "The Boke for a Justice of Peace," "The Boke that teacheth to keepe a Court Baron or a Lete," "The Boke teaching to keep a Court Hundred," "The Boke called Retorna Brevium," "The Boke called Carta Fœdi," and "The Boke of the Ordinaunce to be observed by the Officers of the King's Eschecker for fees-taking." This ordinance for regulating fees in the exchequer was made in the time of Henry VI.⁸ To these

¹ Typ. Antiq., 387, 388, 447, 481.

³ Ibid., 555.

⁵ Ibid., 708.

² Ibid., 408.

⁴ Ibid., 521.

⁶ Ibid., 874.

⁷ His words are, "Lyke as a chylde goynge to scole, fyrste lerneth his letters out of the a, b, c, so they that entende the study of the law do fyrste study these." Typ. Antiq., 481.

⁸ Ibid., 447, 448.

productions of this reign may be added two pieces that have lately been brought to light: one entitled "A Replication of a Serjaunte at the Lawes of England to certayne Pointes alleaged by a Student of the said Lawes of England, in a Dialogue in Englishe between a Doctor of Divinity and the said Student;" the other, "A Little Treatise concerning Writs of Subpœna." The latter is thought to be written by St. Germyn, in vindication of the passages in his "Doctor and Student" that had been attacked by the supposed serjeant in the former tract.¹

Some publications of this period, on the controversies about religion, may, from the incidental discussion of certain points of ecclesiastical jurisprudence, be reckoned in the class of law-books. Such was "A Treatise concerning the Division between the Spirituality and Temporality," which was also printed under the title of "The Paceyfer of the Division between the Temporality and Spirituality." This is attributed to St. Germyn; and the principal part of Sir Thomas More's "Apology" is levelled at this work. To this St. Germyn replied in another tract, entitled "Salem and Bizance: a Dialogue betwixte two Englishe Men, whereof one was called Salem, and the other Bizance," which occasioned Sir Thomas More's "Debellacyon of Salem and Bizance." The last two works were printed in 1553.² To these may be added other treatises, the authors of which are not known: "A Treatise concerning Divers of the Constitutions, Provincial and Legatine," "A Treatise concerning the Power of the Clergy and the Laws of the Realm," both printed by Godfrey; "The true Difference between the Regal Power and the Ecclesiastical Power;"³ "The Liberties of the Clergy, collected out of the Laws of the Realm by John Goodall;" "A Dialogue between a Knight and a Clerk on Power, Spiritual and Temporal."⁴ We find also a translation of the "Constitutions, Provincial and Legatine," printed in 1534.

Next to the performances of writers, those of printers

¹ These two pieces are now printed for the first time in Mr. Hargrave's first volume of Law Tracts.

² Typ. Antiq., vol. i., 402, 421, 478.

³ This book has been attributed by some to Henry VIII., by others to Bishop Fox. Typ. Antiq., vol. i., 354.

⁴ Typ. Antiq., vol. i., 324, 384, 402, 437.

are to be reckoned among the helps to the study of the law. At the opening of this reign, Pynson was continued in the appointment of king's printer, and he was succeeded by Thomas Berthelet, in 1529. Berthelet was the first who had this office granted to him by patent: the grant was for life, and he kept it during the whole of this reign.¹ The printing of law-books lay principally with these printers, with John and William Rastell, and with Robert Redman; all of whom printed the statutes and various law-treatises over and over again.

It is unnecessary to enumerate the several collections of the statutes at large that were printed in this reign;² it is sufficient to observe of them in general, that they usually bore the title of "*Magna Charta*," or "*Liber Magnæ Chartæ*," and they commonly contained all the acts down to the time of their publication. But some of those editions deserve more particularly to be remembered. In 1531, Berthelet printed some statutes with the common title of "*Magna Charta, cum aliis Statutis*." Some few months after, in 1532, he printed another collection, under the title of "*Secunda Pars Veterum Statutorum*." On the back of the leaf he informs the reader, that the following statutes were known to few, and were now printed for the first time, having been most of them examined with the parliament-rolls; and because some other statutes, printed with "*Magna Charta*," were entitled "*Vetera Statuta*," he thought the present might very properly be called by the title he had given them.³ These titles seemed to please the editor, for in 1540, we find these two books again printed by Berthelet.⁴ In 1543, the same printer published, in one volume, all the statutes from Henry III. to the first of Henry VIII.⁵ Before that, in 1534, there was printed by Redman an edition of the statutes in English, translated by George Ferrer, which was reprinted in 1542.⁶

Next to the statutes at large, the abridgment of them presents itself. The abridgment mentioned in the former

¹ Typ. Ant., vol. i., 241, 417.

² The following are different editions of the statutes at large: By Pynson, in 1519, 1526, and 1527; by Wynkyn de Worde, in 1528; by Redman, in 1525, and 1539. Typ. Antiq., 177, 265, 275, 279, 386, 396.

³ Typ. Antiq., 419. ⁴ Ibid., 436. ⁵ Ibid., 443. ⁶ Ibid., 394, 554.

reign seems to have been frequently reprinted. "Le Breggement de toutz les Estatuts" was printed by Pynson in 1521, and again, with additions by William Owein of the Middle Temple, in 1528.¹ In 1527, an abridgment of the statutes was printed in English, by John Rastell;² and in 1533, with considerable additions, by William Rastell, under the title of "The grete Abregement of the Statutys of Englonde, untill the 22d yere of Henry VIII.;"³ which was reprinted with the same title by Petit, and also by Myddylton, in 1542, containing the abridgment of statutes down to 33 Henry VIII.⁴

Thus far of collections of the statutes at large, and of abridgments of them. We find some specimens of those partial publications that have become of late days very common from the use they are of in practice. In 1538 was printed "A Booke, containing the Statutes which the King had enjoined to be put in execution by Justices of Peace, Sheriffs, Bailiffs, Constables, and other ministers of justice."⁵ It should be added to this account of the statutes, that they were also printed regularly after every session of parliament.

The printing of the Year-Books was carried on with great earnestness during this reign; but, as has been before observed, owing to their being generally printed without a date, the time of their appearance, for the most part, cannot be ascertained.⁶ We know that they were mostly printed by Pynson, by Berthelet, and by Redman. The earliest that has been found with a date was printed in 1517 by Pynson.⁷ They were usually printed single; but those from 22d to 28th of Edward III. inclusive were printed in one publication in 1532. The famous "Annus Quadregesimus" was not printed till 1532.⁸ Many remained unprinted at the close of this reign. Several ancient law-books were printed and reprinted. In 1522, we find the "Natura Brevium," since called the "Old Natura Brevium:" in 1525, "The Olde Teners," newly corrected.⁹

¹ Typ. Antiq., 267, 268, 281.

² Ibid., 429.

³ Ibid., 432.

⁴ Ibid., 330.

⁵ Ibid., 554, 573.

⁶ However, those versed in typographical antiquities have fixed the date of some. The 46th Edward III., in 1517; the 7th and 48th Edward III., in 1518; the 50th Edward III., in 1519; the 47th Edward III., in 1520. These were printed by Pynson, as was the *Liber Assisarum*, without a date. Typ. Antiq., 264, 265, 300.

⁷ Typ. Antiq., 302, 400.

⁸ Ibid., 394, 420.

⁹ Ibid., 274.

In 1531 was printed, by William Rastell, "The Regyster of the Wryttes, Orygynal and Judycyall."¹ "Britton" was printed by Redman, but without a date; as was "Stat-ham's Abridgment" by, or rather for, Pynson, who employed Tailleux, a printer of Roan in Normandy, to print "Littleton," and many other books, amongst which this was most probably one, as it bears Tailleux's mark.² The "Novæ Narrationes" were printed, but without a date.

Most of these books were reprinted by all the printers during this reign, law-books and school-books being those articles which the early printers were more frequently called upon to multiply than any other. But none passed through the press so often as "Littleton's Tenures," the printing of which seems to have raised a violent competition between two famous printers of these days.³

There was not less concern in this reign than in the former about the ecclesiastical part of our law. "Lyndwode's Provinciale" underwent repeated impressions. In 1529, "The Legatine Constitutions of Otho and Ottoboni" were printed by Wynkyn de Worde.⁴ We find also a book without a date entitled "Tractatus Juris Canonici."⁵

We cannot dismiss this catalogue of new-printed books without making a few remarks upon the most distinguished of them, "The Register of Writs."

"The Register of Writs" is said to be the oldest book in the law; a character which may, in a great measure, be true, but should not be allowed without some

The Register.

¹ Typ. Antiq., 475.

² Ibid., 241, 284, 399.

³ In an edition of Littleton, printed by Pynson in 1525, there is the following address to the reader, containing a bitter invective against Redman: *En tibi, candide lector, jam castigatior (ni fallor) Littletonus occurrit. Curavi ut e calcographid meâ non solum emendatior, verum etiam elegantioribus typis ornatior prodeat in lucem, quam elapsus est e manibus Roberti Redman, sed verius RUDEMAN, quia inter mille homines RUDIOREM haud facile invenies. Miror profecto unde nunc tandem se fateatur Typographum, nisi forte quum diabolis sutorum naclerum, et illum calcographum fecit. Olim nebulo ille profitebatur se bibliopolam tam peritum quam unquam ab Utopia exiit: Bene fait, liber est, qui præ se speciem libri fert, præterea fere nihil; tamen ausus est scurra polliceri sud curâ reverendas ac sanctas leges Angliæ scilicet vereq; omnes imprimere. Utrum verba dare usus, an verax sit, tu Littletono legendo, scilicet sud curâ ac diligentia excuso, illico videas. Vale.* Pynson attacked him in another edition of Littleton and in one of Magna Charta. Pynson was at this time jealous of Redman's rising merit and pretensions as a law-printer. But this some years after subsided, and a reconciliation probably took place, for Redman became successor to Pynson in his house and trade. Typ. Antiq., 274, 385.

⁴ Typ. Antiq., 180, 287.

⁵ Ibid., 287.

consideration. It is not more certain than extraordinary, that the forms of writs were very early settled, in their substance and language, nearly in the manner in which they were drawn ever after. However, this uniformity was not so exact as that the writs published and used in the reign of Henry VIII. were all of them identically the same with those used at the first origin of this invention, in the reign of Henry II. It is not to be wondered that there should be a difference in these forms at their infancy, and at this advanced state of our law, but it is extremely remarkable that the difference should be so small.

As the writs in the printed "Register" must be taken to be such as they were used at the time of its publication, it will be curious and amusing to compare them with those in several antecedent periods of our law; with those in Glanville and Bracton, those in the reign of Edward I., and those in the old "*Natura Brevium*," in the reign of Edward III. This, we shall attempt, by selecting some of the principal original writs.

To begin with Glanville. We find the writs of novel disseisin and of mortd'ancestor, as given by that author,¹ correspond exactly with those in the "Register," in the scope, substance, and words; with the difference only of the *teste* in the name of the grand justiciar, as all writs were then, of the king's stile, which was then always in the singular number, and of a return consistent with order of judicature in those times. On the other hand, the writ of right of advowson,² though it agrees in the main of it with that in the "Register," is not *verbatim* the same. The *assisa ultimæ præsentationis*³ differs only in a few words. The writ of debt⁴ is *verbatim* the same, except that instead of alleging the *detinet*, it says, *injustè deforceat*. These are a few out of the many observations that might be made on a comparison of the writs in Glanville with those in the "Register."

The writs in Bracton, as to their compilation, *teste*, and direction, are nearer the present form than those in Glanville. As to the substance of them, it appears, that the writ *de dote unde nihil habet*⁵ *assisa mortis antecessoris*,⁶ and *quare impedit*,⁷ agree with the "Register" *verbatim*. The

¹ Vide vol. i.

² Vide vol. ii.

³ Ibid.

⁴ Ibid.

⁵ Lib. 4 Tr. b., c. 1, 2.

Vide vol. ii.

⁶ Lib. 4 Tr. 3, c. 2.

Vide vol. ii.

⁷ Vide vol. ii.

writ of *assisa ultimæ præsentationis*¹ agrees in substance, but not *verbatim*: and the writ of *intrusion* differs entirely² from the "Register."

In the time of Edward I. the subject of writs was studied with more nicety; therefore, after the near correspondence we have seen between the precedents of the time of Henry III. and those in the "Register," we must not wonder to find it then still more. In the "*Statutum Walliæ*," among the regulations made for the judicial polity of that principality, there are forms of writs prescribed, which, no doubt, were copied from those used in our courts; and these, with the single difference of the returns, and the style of the justices peculiar to the courts there, are *verbatim* the same with those in the "Register;" these are, the writ of dower, assize of mortaucestor, of novel disseisin, of common pasture, of debt, of covenant, of appointing an attorney, and *de coronatore eligendo*.³

The reigns of the three Edwards constituted a period when the learning of writs was cultivated with great attention. Accordingly we find, that the forms of them were so completely settled during that time, that the writs in the "Old Natura Brevium," a collection made in the last of those three reigns, agree *exactly* with those of the "Register;" only the writ of intrusion,⁴ which differed so widely in Bracton's time, was not yet reduced to the form of the "Register." In the time of Henry VIII. the writ of trespass and assault, the earliest precedent of which (except some records in Riley's "*Placita*," in Edward I.'s reign) is in the "Old Natura Brevium," has a very trifling difference from that in the "Register." The writ in the former does not contain the following words of aggravation, *ita ut de vitâ ejus desperabatur*, which are in the latter.

These differences, though many of them may appear in themselves quite immaterial, yet serve in some measure to date the antiquity of the writs collected in this volume. It may be inferred from this comparative view, that the substance of original writs, in their conception, drift, and language, is very ancient; that the alterations they have undergone have been very few, and those only in a small turn of phrase, the change of a word, or at most the addition of some small circumstance; that those changes were

¹ Lib. 4 Tr. 2, c. 1, 2. *Vide* vol. ii.

³ *Vide* vol. ii., c. ix.

² Lib. 4 Tr. 1, c. 2. *Vide* vol. ii.

⁴ *Ibid.*, vol. ii.

made in general very early ; that the forms were, most of them, settled *verbatim* at least by the time of Edward III. ; and in that state were afterwards printed in the "Register" in the reign of Henry VIII.

This observation as to the antiquity of writs is only meant to apply to those common-law remedies which we have been just recounting, and the like ; for many of the writs in the "Register" are evidently of later origin than the time of Edward III., being some of them framed upon statutes passed since, and others contrived in consequence of alterations in practice, or for other causes.

Having said thus much concerning the probable antiquity of the "Register," we should next consider the contents of this volume, of which it will be sufficient to say, that it contains writs, original and judicial, adapted to the purpose of redress in every possible case of injury to the person or property ; to provide for every incident which may arise in the course of a judicial proceeding ; and, finally, to give the full effect to such proceeding by execution.

It was by degrees that writs increased to the multitude and variety which is exhibited in this volume. A sufficient foundation seems to have been laid for this superstructure even in Glanville's time. From the numerous writs, and the application of them, in Glanville's work, we can perceive, that at every turn and stop in proceeding, whenever there was a *dignus vindice nodus*, a writ was ready framed to remove the cause of delay, and expedite the progress of the suit ; so that there were, in his time, writs contrived suitable to very many occasions. In the time of Bracton we find them greatly increased ; and yet, perhaps, this increase was not so much in the new kinds of writs, though that too was considerable, as in the variety of forms to suit similar cases of the same kind. Thus, for instance, where we find in Glanville only one precedent of an original writ, or at most two ; in Bracton there are sometimes seven or eight different forms, fitted to the special circumstances of particular cases.

In the times of Glanville and Bracton, writs were *formata* ; that is, every particular variation was *formed*, as we are told, by express authority of parliament, and the clerks in chancery could not alter an iota of that which had been sanctioned by the legislature. If the increase of writs was so rapid under the great difficulty of applying to par-

liament in every new case, it is not to be wondered, that after the statute of Westminster 2 had allowed the clerks to make writs *in consimili casu*, the number and variety of them should multiply to the degree they did; and that where there were seven or eight different precedents of one kind in Bracton, there should be ten or more in the "Register" in the present reign. The construction of *similar cases* left such a latitude, when applied to every writ at that time existing and in practice in the chancery, that the masters, who were appointed for this special purpose, devised new writs with great readiness, on most occasions, where they were warranted by any color of former precedent; so that, in consequence of this statute, the business of making new writs became entirely a matter of legal discretion.

When things had taken this course, writs came under a very different consideration from that in which they stood formerly. In early times, when they were in a stated form, and that form was in general known only to those in the chancellor's office, the courts used to consider themselves as bound to abide by them, whatever they were, looking upon them as precepts issuing out of an office where themselves had no control or direction, and taking for granted that they were in the usual course; but after this statute, writs were no longer a point of official knowledge. The masters, whose particular business was the making of writs, were chosen for their learning in the law; and as they could frame them only on principles of legal analogy, the courts took upon them to judge of the legality of them, as a matter to which they were equally competent with the masters. Hence it was that writs became a new learning among the professors of the law: and we find in the reign of Henry VI. no less than ten inns of chancery established for this particular study, which was considered as containing the first principles of the law, and that in which young men could employ their noviciate with the greatest advantage.

This, in time, had very material consequences. The knowledge of writs was so far from being peculiar to the masters, that they were not even the most knowing in their own art. This knowledge was in the hands of everybody; and he who had most knowledge of the law was the best able to word a writ. It then happened that the masters, as they grew to be of less consideration for this

particular skill, in time neglected the study entirely ; and the practisers were under the necessity, for the safety of their cause, to get lawyers of eminence to settle the form of a writ. This they presented at the office to be put to the seal, under the inspection of a master ; till at length even that formality ceased ; and in this reign it had become the practice to pass them only through the cursitors' office, without any interference of a master, and so present them for sealing. Thus, by a singular revolution, did the making of writs become again a matter, as it were, *de cursu*, in which the chancery took no further concern than what related to the ceremony of the seal.

The masters in chancery in this reign were men quite of another profession ; they were most of them civilians and ecclesiastics ; and it had been a rule with the chancellor to present them to churches not exceeding twenty marks in value.¹

When things were in this state, the "Register" was printed, by which this kind of learning seemed to be made more declaredly *publici juris* than ever. Whether it is to be attributed at all to the publication of this book, which might have taken off any peculiar sanctity heretofore ascribed to its forms, or to the inattention and want of skill in the then set of masters, or to the unaccountable change of opinions in matters of law, as well as in everything else ; whatever was the cause, it so happened that soon after the present period, this repository of chancery learning began to be looked upon with less reverence than formerly. In the reign of Queen Mary, it was said by a judge on the bench that a writ was not exceptionable because not to be found in the "Register ;" the truth of the case was now to be the guide in drawing a writ, and not the precise form that was exhibited in the "Register."²

Indeed, the knowledge of writs had long been so general, that probably the same opinion was held respecting this collection at the time it was published. However that may be, it was certainly at that time a valuable addition to the law library. For though it was not then considered as furnishing a collection of forms and rules conclusive and incontrovertible, yet it must be received as a set of precedents of the highest authority, and ap-

¹ Hist. Chanc., 36.

² Plowd., 229.

proaching nearer to absolute perfection than anything then in print. With regard to posterity, it stands in a different light. The revolution which had begun to take place in the methods of redress, and which was now becoming every day more general, rendered great part of this famous volume obsolete before the world was put in possession of it; and the current has ever since set so strong the same way that, at this time, the "Register" is reduced to a piece of juridical antiquity, and is oftener resorted to as a matter of historical curiosity than of practical use. The selection made by Fitzherbert is abundantly more than sufficient for the few inquiries now made into the nature of writs.

It appears from a manuscript of this reign, relating to the government and discipline of the Middle Temple, that the members of that society were divided into two companies, called Clerks' Commons and Masters' Commons. The first consisted of young men during their first two years' standing, or thereabouts, till they were called up to the Masters' Commons. The Masters' Commons was divided into three companies, that is, No Utter Barristers, Utter Barristers, and Benchers. The first of these were such as from their standing, or neglect of study, were not called upon by the Elders or Benchers to dispute and argue some point of law before the Benchers: those disputes were called Mootings. Utter Barristers were such as were five or six years' standing, and were called upon to argue at the mootings; so that making an Utter Barrister was conferring a sort of degree for the party's progress in learning. Benchers were such Utter Barristers as had been in the house fourteen or fifteen years; they were chosen by the elders of the house to *read*, expound, and declare some statute openly to all the society. During the time of his reading, this person was called a Reader, and afterwards a Bencher.

There were, as they expressed it, two principal times of their learning; these were called Grand Vacations. One begun the first Monday in Lent; the other, the first Monday after Lammas; each continued three weeks and three days. It was at these seasons that the readings were; in the former, by the Benchers themselves; in the latter, by the Readers. The young members of two years were required to be present at these readings, under pain

of forfeiting twenty shillings for every default. The grand vacations were employed in other exercises for the advancement of knowledge: an Utter Barrister was to oppose some point alleged by the person reading; the young members were called upon to argue some point in presence of three Benchers; they were followed by the Utter Barristers; and, lastly, the Benchers were to decide. This was all carried on in law-French. Such was the form of mooting. Exercises of this kind were performed not only in the grand vacations but in term.

After the term and grand vacations, such young men as were No Utter Barristers were to argue some points in law-French before the Utter Barristers, who were to decide in English; these were called Mean Vacation-Moots, or Chapel-Moots. Further, every day in the year but festivals, the students of each mess, being three, used to argue among themselves after dinner and supper.

The Middle Temple used to provide two Readers, being Utter Barristers, for the two inns of chancery, Strand Inn and New Inn. These read to the students there in term and grand vacation; the students there mooted as in the Temple, and each reader used to bring two with him from the Temple to argue and moot. It seems also that each of the four inns of court sent two persons to every inn of chancery to argue, and after such debate the Reader used to give his opinion.

Such was the education of ancient time in the inns of court and chancery. But this was all voluntary, none being, as the same manuscript acquaints us, compelled to learn. We are informed also, by the same authority, that the young students of the Middle Temple had their studies and places of learning so unfortunately situated, that they were very much annoyed by the walking and communication of those who were no learners. In the term time they were disturbed by clients and clients' servants resorting to attorneys and practisers, so that they might as well be in the open streets as in their studies. The same writer complains that they had no place to walk in, and talk, and confer their learning, but in the church; which place, all the term-time, had in it no more quietness than the Pervyse of Pawle's,¹ by occasion of the confluence and

¹ We have before noticed the custom of serjeants choosing their pillar at

concourse of such as were suitors in the law.¹ Owing to this house having no revenue for the encouragement and support of students, it is observed by this writer that many a good wit was compelled to forsake study before he had acquired a perfect knowledge in the law, *and to fall to practising, and become a typler in the law.*²

In the 32d Henry VIII., an order was made in the Inner Temple that the gentlemen of that company should reform themselves in their cut or disguised apparel, and not wear long beards; and that the treasurer of that house should confer with the other treasurers of court for an uniform reformation, and to know the justices' opinion therein.³ In Lincoln's Inn, by an order made 23d Henry VIII., none were to wear cut or pansied hosen or breeches, or pansied doublet, on pain of expulsion;⁴ and all persons were to be put out of commons during the time they wore beards.⁵ The first serjeants-at-law that received the honor of knighthood were knighted in 26th of Henry VIII.⁶

In the 37th Henry VIII., a further increase was made in the fees of the judges. To the Chief-Justice of the King's Bench, £30 per annum; to every other justice of that court, £20 per annum; to every justice of the Common Pleas, £20 per annum.⁷ There is a manuscript of this reign which sets forth the whole ceremony of calling serjeants; but it is too long for this place, and may be seen in Dugdale (a).⁸

(a) Any further information which may be required upon these subjects, may be obtained in the "Lives of the Judges," by Mr. Foss, which is replete with curious and interesting facts in the history of the legal profession.

St. Paul's, and taking down their client's case on their knees.* That custom, together with the mention of the *Pervyse of Pawle's*, on this occasion, seems to open a passage in Chaucer's character of the Serjeant-at-law.

A sergeaunt of the law both ware and wise,
That oftin had yben at the Pervyse.—*Prol. Cant. Tales.*

* *Vide* vol. iii.

¹ Dugd. Orig., 193.

³ *Ibid.*, 148.

⁵ *Ibid.*, 244.

⁷ *Ibid.*, 110.

² *Ibid.*, 193.

⁴ *Ibid.*, 241.

⁶ *Ibid.*, 137.

⁸ *Ibid.*, 114.

